

No. 97-428-CFX

Title: Air Line Pilots Association, Petitioner  
v.  
Robert A. Miller, et al.

Docketed:  
September 10, 1997

Court: United States Court of Appeals for  
the District of Columbia Circuit

Entry Date

Proceedings and Orders

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Sep 5 1997	Petition for writ of certiorari filed. (Response due October 31, 1997)
Sep 5 1997	Appendix of petitioner filed.
Sep 19 1997	Order extending time to file response to petition until October 31, 1997.
Oct 31 1997	Brief of respondents Robert A. Miller, et al. in opposition filed.
Nov 7 1997	Reply brief of petitioner Air Line Pilots Association filed.
Nov 12 1997	DISTRIBUTED. November 26, 1997
Nov 26 1997	Petition GRANTED. limited to Question 1 presented by the petition. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, January 9, 1998. The brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, February 6, 1998. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 6, 1998. Rule 29.2 does not apply.
	SET FOR ARGUMENT March 23, 1998.
	*****
Jan 9 1998	Brief of petitioner Air Line Pilots Association filed.
Jan 9 1998	Brief amicus curiae of National Education Association filed.
Jan 9 1998	Brief amicus curiae of AFL-CIO filed.
Jan 9 1998	Joint appendix filed.
Feb 6 1998	Brief of respondent Robert A. Miller filed.
Feb 6 1998	Brief amicus curiae of Mackinac Center for Public Policy filed.
Feb 11 1998	CIRCULATED.
Feb 13 1998	Record filed.
Mar 4 1998	Record filed.
Mar 5 1998	Reply brief of petitioner Air Line Pilots Association filed.
Mar 23 1998	ARGUED.

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Office of the Clerk  
No. \_\_\_\_\_

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1997

AIR LINE PILOTS ASSOCIATION,  
*Petitioner,*  
v.

ROBERT A. MILLER, *et al.*,  
*Respondents.*

On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

JERRY D. ANKER  
*(Counsel of Record)*  
CLAY WARNER  
Air Line Pilots Association  
Legal Department  
1625 Massachusetts Avenue, N.W.  
Washington, D.C. 20036  
(202) 797-4087

31PP

## QUESTIONS PRESENTED

1. When nonunion employees wish to challenge the agency fee they are required to pay under an agency-shop agreement, must they exhaust the "impartial decision-maker" procedure mandated by this Court's decision in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986) before bringing their claim to court?

2. After an "impartial decisionmaker" has held a full evidentiary hearing and issued a decision concerning the calculation of an agency fee, should a court that is subsequently presented with a challenge to that calculation accept the decisionmaker's findings of fact if they are not clearly erroneous, and determine *de novo* only the issues of law that are presented?

3. In the absence of any claim of fraud or willful misconduct, should a court accept an audit performed by a reputable national accounting firm as satisfying the requirement that a union's agency-fee disclosure statement be "verifi[ed] by an independent auditor," *Hudson*, 475 U.S. at 307 n.18, notwithstanding allegations by nonunion employees that the audit was not properly conducted?

4. When government regulation directly impacts matters that are within the scope of a union's collective bargaining responsibilities (in this case, on-the-job safety of airline pilots), is union advocacy with respect to such regulation an activity that is "germane to collective bargaining," the costs of which are properly chargeable to nonmember employees who are subject to an agency-shop agreement?

# LIST OF PARTIES

The parties before the Court are the same as the parties in the court below. They are:

## *Petitioner (appellee below)*

Air Line Pilots Association

## *Respondents (appellants below)*

Ted M. Abbott	Ramond Dale Compton
Neal E. Alberts	Peyton H. Cook, Jr.
Clarence A. Anderson	William S. Cook
J. Eric Anderson	Marcus Covington, Jr.
J.L. Armstrong	James J. Crayton
Donald E. Asay	Frederick T. Darvill
David J. Baccitich	Gale Charles Davis
Gerda H. Baitis as representative for the deceased	Charles P. Dawsen
Walter W. Baitis	Brian Decker
R.B. Barnes	Timothy L. Dermer
David Bauer	Joseph H. DeVelis
Alan G. Blake	W. David Doiron
Dale N. Boschetto	James V. Dunlap
Richard A. Breems	John D. Durris
David L. Brinton	James S. Ehmer
John C. Brittenhaus	Joseph M. Elder
Robert Brushwyler	Jerry D. Elmore
Jerald C. Burgess	Bruce E. Elmquist
G.D. Burson	Robert D. Engel
Cornelius J. Carney	William T. Erwin
Alvin W. Chamberlain	George W. Etter
Maurice Cloutier	James T. Ferguson
	Roger Ferris

Ferdinand Fletcher	John P. Jenkins
Neil B. Fossum	Peter G. Just
G.R. Fow	Robert Kane
Don L. Fowler	Arthur L. Knowles
R. Dell Fuller	Gordon B. Kuntz
Alan L. Gaines	Edouard W. Lacroix, Jr.
Gary Gebo	Dominic Lemma
James A. Gibbons	John L. Lynch
Patrick M. Glazier	Leslie C. Long
Richard D. Grantham	Robert G. Lyon, Jr.
Nicholas Gravino	Donald D. MacEachern
Dennis E. Greulich	Peter E. Martin
Gary Guilliat	Donald E. Massey
John F. Gulledge	Jack B. McBride
George S. Haines	Joe C. McDole
Michael T. Hannan	William A. McGaw
Barry W. Harman	Michael D. McGibney
George L. Harmon	Gary R. McHargue
Douglas R. Harper	Dane W. McNeil
John C. Harrison	Charles R. Miller
James C. Harwood	Dale E. Miller
Harvey L. Hayden	Robert A. Miller
George Hector	Einar J. Mogensen
John Hemminger	Ronald A. Morin
L.R. Hern	C. Richard Morrow
Robert W. Hobbs	Robert M. O'Brien, Jr.
Harry F. Houdeshel	Winthrop B. Orgera
Willard F. Ice	Keith E. Parker
Lester H. Ideker, Jr.	Paul E. Paulsen
Dominic M. Insogna	Dale F. Peel

Joseph A. Peterman	Dale A. Sticka
Larry W. Peterson	Murray V. Stookey
William W. Peterson	Larry J. Taylor
Patrick A. Pettyjohn	John S. Thompson
James R. Pittman	Donald L. Thorn
Thomas J. Prosch	Richard Tichacek
George S. Pupich	James A. Tidwell
John C. Rector	Michael H. Uhlenhop
Terril J. Richardson	Edwin D. Uselmann
Charles E. Robinson	Ernesto E. Valadez
Gordon G. Rogers	John M. Valenzuela
Lenard A. Rogers	Denis F. Waldron
Allan H. Roy	Michael J. Walton
Melvin A. Rozema	Robert W. Warner
James P. Scanlon	George B. Waterman
Robert P. Scheinblum	Neal C. Watshon
N.E. Schulze	R. Taft Weaver
Kenneth Shackelford	M.G. Wilson
John M. Sharp	Howard C. Wolf, Jr.
Kerin L. Shaughnessey	Michael N. Wood
Robert K. Shepherd	H.S. Wright, III
Gary D. Simmons	Edward J. Wucik
David F. Smith	Warren B. Young
Robert W. Spielman	Robert V. Ziminsky
James Sorley	

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AIR LINE PILOTS ASSOCIATION,  
v. *Petitioner,*  
ROBERT A. MILLER, *et al.,*  
*Respondents.*

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On Petition for a Writ of Certiorari to the  
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for the District of Columbia Circuit

\_\_\_\_\_  
**PETITION FOR A WRIT OF CERTIORARI**  
\_\_\_\_\_

Petitioner Air Line Pilots Association respectfully petitions this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

**OPINIONS BELOW**

The opinion of the court of appeals is officially reported at 108 F.3d 1415, and is reprinted in the separately bound appendix to the petition (App.) at page 1a. The United States District Court for the District of Columbia issued three separate opinions plus an order denying a motion to amend or alter the judgment, none of which is officially reported. They are reproduced, respectively, at App. 21a,

44a, 62a and 41a. The Amended Opinion and Award<sup>1</sup> of Arbitrator Louis Aronin, whose findings of fact were accepted by the district court, is reprinted at App. 71a. The arbitrator also issued a Supplemental Opinion and Award, which is reprinted at App. 158a.

### JURISDICTION

The decision of the court of appeals was issued on March 14, 1997. A timely petition for rehearing and suggestion for rehearing *en banc* was denied by the court of appeals on June 9, 1997. (App. 162a, 164a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

### CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 2 Eleventh of the Railway Labor Act, 45 U.S.C. § 152 Eleventh, provides in pertinent part:

Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days

<sup>1</sup> The Amended Opinion and Award was identical to the arbitrator's original Opinion and Award except for nonsubstantive typographical and editorial corrections.

following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

### STATEMENT OF THE CASE

Petitioner Air Line Pilots Association (ALPA) is a labor organization that represents the pilots employed by most U.S. commercial air carriers, including Delta Air Lines, Inc. In November 1991, ALPA and Delta negotiated several amendments to their existing collective bargaining agreement, including an "agency shop" provision. This provision requires all represented pilots who choose not to become or remain members of ALPA to pay a "service charge" to ALPA in an amount equal to ALPA's dues and certain assessments. ALPA has similar agreements with most other airlines with which it bargains.

Respondents, who are pilots employed by Delta, brought this action in December 1991 to enjoin implementation of the agency-shop agreement.<sup>2</sup> The jurisdiction of the district court was invoked on the basis of 28 U.S.C.

<sup>2</sup> The original complaint was filed by five pilots, only three of whom remain in the case as respondents before this Court. One of the original plaintiffs, Donald Pedrazzini, voluntarily withdrew from the case while it was still pending in the district court. Another, Bruce R. Booher, was dismissed by the district court because he was an ALPA member, and he ultimately withdrew from the appeal. The other respondents are 150 nonmember pilots (one

§§ 1331 and 1337, and 29 U.S.C. § 412. The original complaint alleged seven separate grounds on which respondents claimed the agreement was unlawful under federal statutory and constitutional law, and a subsequent amendment to the complaint added two more grounds. The district court, in three separate decisions (App. 21a, 44a, 62a), dismissed all of respondents' claims. Most of those claims were abandoned on appeal.

Only two of the claims raised in the complaint remain at issue: (1) the claim that ALPA does not properly calculate the percentage of its expenses that are germane to collective bargaining and therefore chargeable to objecting agency-fee payers under applicable decisions of this Court, and (2) the claim that ALPA's independent auditors, Price Waterhouse, did not properly audit ALPA's 1992 "Statement of Germane and Nongermane Expenses," which ALPA issues each year in compliance with the disclosure requirements imposed by this Court's decision in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986). The first, second, and fourth questions presented in this petition relate to the first of these claims; the third question relates to the second claim.

#### **ALPA's Policies And Procedures Applicable To Agency Fees**

ALPA has adopted written "Policies and Procedures Applicable to Agency Fees" designed to ensure that no nonmember's agency fees are used, over his objection, for any purpose not germane to collective bargaining. These Policies and Procedures:

- (1) inform nonmembers how to notify ALPA if they have an objection to paying for nongermane activities;
- (2) require ALPA to prepare and distribute each year to all nonmembers paying agency fees a "Statement of

of whom is now deceased and represented by his executor) who were permitted to intervene by the district court and who participated in the appeal.

Germane and Nongermane Expenses" (SGNE), audited by ALPA's independent auditors, disclosing "in reasonable detail, the year's expenditures, segregating those that were germane to collective bargaining from those that were not";

(3) provide that all agency-fee payers who submit a written objection will receive an appropriate dues reduction, rebate, or credit, based on the percentage of ALPA's expenses that the SGNE shows were used for purposes not germane to collective bargaining; and

(4) provide an arbitration procedure by which an objector may challenge ALPA's calculation of the dues reduction or rebate. The selection of the arbitrator, and the procedures of the arbitration, are governed by the American Arbitration Association Rules for Determination of Union Fees.

#### **The Arbitration Proceeding In This Case**

The first year that respondents were required to pay an agency fee pursuant to the Delta agency-shop agreement was 1992. The SGNE for that year was issued in 1993, after ALPA's 1992 books had been closed and audited, and while this lawsuit was already pending. It showed that 19 percent of ALPA's expenses in 1992 were not germane to collective bargaining. (App. 120a).

One hundred seventy-four pilots, including many (but not all) of the respondents, requested arbitration of the 1992 calculation as reflected in the SGNE. The arbitration hearing occurred over three days, during which both oral testimony and documentary evidence were presented. Respondents' counsel objected to the arbitration but entered a "conditional" appearance on behalf of all the plaintiffs in this case and participated actively in the proceeding, challenging ALPA's record-keeping and fee calculation on numerous grounds. After the close of the hearing, both sides submitted comprehensive written briefs.

The arbitrator upheld ALPA's computation of germane and nongermane expenses for 1992 in all but four respects. He directed ALPA to reallocate expenses attributable to those four items from germane to nongermane, and ALPA did so. The reallocations resulted in an increase in the nongermane percentage for 1992 from 19 to 20.49 percent. The arbitrator approved this recalculation in his Supplemental Opinion and Award. (App. 158a-161a).

With respect to issues relevant to this petition, the arbitrator ruled as follows. First, despite the "conditional" appearance of plaintiffs' counsel, only those pilots who had submitted timely requests for arbitration prior to the hearing were entitled to be parties to the arbitration proceeding. (App. 73a-75a). Second, ALPA's expenditures to promote air safety are germane to collective bargaining, and are not ideological in character. They are therefore properly chargeable to agency-fee objectors. (App. 96a-108a).

#### The Decisions Of The District Court

As noted above, the district court issued three separate decisions concerning the merits of this case. Its first decision, issued on August 2, 1993, granted ALPA's motion for summary judgment with respect to most of respondents' claims but denied the motion with respect to others, including the claim that ALPA improperly charged agency-fee payers for costs that were not germane to collective bargaining. (App. 62a-70a). The denial was "without prejudice to renewal following further proceedings, including the additional round of discovery." (App. 70a). In separate orders issued on the same date, the court (a) allowed respondents to amend their complaint by adding, *inter alia*, the claim that ALPA's SGNE was not properly audited, and (b) granted respondents' motion to reopen discovery.

The second decision was issued on April 28, 1995, after the new round of discovery had closed and ALPA had

renewed its motion for summary judgment with respect to the remaining claims. In that decision, the court disposed of the claim that the SGNE had not been properly audited. The court found that the "Report of Independent Auditors" signed by Price Waterhouse, which accompanied the SGNE, established that the SGNE had been audited, and concluded that this was sufficient to satisfy the *Hudson* requirement of "verification by an independent auditor." (App. 51a-52a). However, with respect to plaintiffs' claim that ALPA did not properly calculate its germane and nongermane expenses in its 1992 SGNE, the court requested further briefing concerning what deference, if any, the court should give to the decision of the arbitrator and what effect, if any, the arbitration decision should have on those plaintiffs who were not parties to it. (App. 58a-59a).

The third decision was issued on August 30, 1995, after the requested briefing. The court held that nonunion employees who wish to challenge the calculation of their agency fees must exhaust the "impartial decisionmaker" procedure mandated by *Hudson*. Therefore, those of the plaintiffs who were not parties to the arbitration could not pursue their claims in court. (App. 27a-32a). The court further held that the proper standard of review of the arbitration decision would be to "defer to the findings of fact of the arbitrator unless those findings are clearly erroneous," but to "review *de novo* the arbitrator's legal conclusions." (App. 22a). In justifying these conclusions, the court stated:

The Court concludes that the requirement of exhaustion of arbitral remedies and the standard of review set forth above give effect to the procedures established by the Supreme Court in *Hudson* and prevent the situation whereby unions subject to the RLA would have to defend their agency shop fee calculations in two separate trials every year—both in an arbitration proceeding and in a lawsuit brought by

nonmembers who elect not to participate in the arbitration.

(App. 31a-32a).

The court then reviewed the arbitrator's decision according to the standard it had adopted and upheld that decision in all respects. (App. 32a-39a). With respect to the one substantive issue that is pertinent here, the germaneness of ALPA's air safety activities, the court stated:

Plaintiffs allege that ALPA should have treated all costs related to air safety activities as nongermane to collective bargaining. Their main argument with respect to air safety is that, because ALPA's safety activities involve contacts with the FAA and other government entities, charging nonmembers for such activities is impermissible. . . . The record shows that ALPA's role in air safety includes accident investigation, the representation of pilots in grievances before the FAA, involvement in local and regional air safety committees, and other activities designed to promote safety. . . . ALPA's collective bargaining agreement with the Delta pilots includes safety-related provisions.

Because the air safety costs are not directly related to ALPA's representational duties, the Court must apply the standards set forth in *Lehnert* [v. *Ferris Faculty Ass'n*, 500 U.S. 507 (1991)] to determine if those costs are properly chargeable to the union nonmembers. The Court concludes as a matter of law that ALPA has met its burden of proving that the air safety costs have been properly allocated as germane expenses. Such expenditures are germane to collective-bargaining activity because they are a subject of the collective bargaining agreement. Safety expenditures are justified by the government's vital policy interest in labor peace and avoiding "free riders." Finally, safety expenditures do not significantly add to the burdening of free speech. See *Lehnert*, 500 U.S. at 519. The air safety expendi-

tures are not being used for a political purpose simply because ALPA has some dealings with the federal government. The Court can find no constitutional grounds by which a nonmember could object to being charged for safety costs.

(App. 37a-39a).

#### The Court Of Appeals Decision

The court of appeals reversed the district court on three grounds. First, it held that respondents were not required to exhaust the arbitration procedure, because they had never agreed to arbitration. Second, it held that, as a matter of law, any expenses incurred by ALPA in connection with advocacy before government entities on issues relating to air safety cannot be charged to agency-fee objectors. Third, it held that the respondents were entitled to a trial on their claim that Price Waterhouse had not conducted a proper audit of the SGNE.

With respect to the exhaustion issue, the court noted that "[t]he circuits are split as to whether a union, obliged by federal law to offer *Hudson*-style arbitration to nonmembers challenging the amount of agency fees that they are charged, is entitled to insist on 'exhaustion' before the dissident employees come to federal court." (App. 10a). The court also acknowledged that Justice White's concurring opinion in *Hudson* had expressed the view that exhaustion was required. The court concluded, however, that there was "no legal basis for forcing into arbitration a party who never agreed to put his dispute over federal law to such a process. Nor is there anything in the *Hudson* majority opinion that even suggests that the Court thought it was putting protesting agency shop employees in that position." (App. 11a, emphasis in original; footnote omitted).

With respect to ALPA's advocacy on safety issues, the court considered such activity to be "political" in nature and therefore precisely the kind of activity that dissenters

cannot be required to support. The fact that safety is a matter within the scope of collective bargaining, the court said, "hardly renders the union's government relations expenditures germane." (App. 14a). Although this Court had recognized, in *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 519-20 (1991), that for unions in the public sector certain kinds of lobbying are an integral part of the collective-bargaining process, the court of appeals concluded that "extension of the *Lehnert* exception" to the present situation "would swallow the *Lehnert* rule." (App. 15a).

With respect to the audit issue, the court held that "[t]he professional adequacy of the *Hudson* audit is certainly a proper subject for review by a judge or an arbitrator." (App. 17a-18a). Therefore, various criticisms leveled at the Price Waterhouse audit by an accountant retained by the respondents raised a factual dispute that would have to be tried by the district court. (App. 18a-19a).

### REASONS FOR GRANTING THE WRIT

A series of decisions of this Court has imposed on unions both substantive<sup>3</sup> and procedural<sup>4</sup> obligations to

<sup>3</sup> See *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961); *Brotherhood of Ry. Clerks v. Allen*, 373 U.S. 113 (1963); *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Ellis v. Brotherhood of Ry. Clerks*, 466 U.S. 435 (1984); *Communications Workers v. Beck*, 487 U.S. 735 (1988); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991).

<sup>4</sup> See *Chicago Teachers Union, Local No. 1 v. Hudson*, *supra*. Because the *Hudson* case involved public employees, the Court's decision was based on the First Amendment rather than any federal statute. However, as the court below pointed out (App. 8a), agency shop agreements negotiated under the Railway Labor Act have been held to be subject to the same constitutional restrictions as those in the public sector. See *Lancaster v. Air Line Pilots Ass'n*, 76 F.3d 1509, 1519-20 (10th Cir. 1996). Moreover, the court below held that the same procedural requirements imposed on public employee unions by the First Amendment would apply to

nonmembers who are subject to agency-fee agreements. These rules have been developed by the Court based on its interpretation of the underlying purposes of the applicable labor statutes and/or the implied imperatives of the First Amendment. While the Court's decisions in this area are clear as to some matters, other issues are unresolved, causing confusion, conflict, and unnecessary litigation in the lower federal courts. This case presents several such issues, and the protracted litigation that those issues have spawned in this and other cases demonstrates the need for further clarification by this Court.

### I.

One issue, in particular, is a subject of squarely conflicting decisions among the Circuits. That is the issue of whether the "impartial decisionmaker" procedure mandated by the *Hudson* decision must be exhausted before a union's agency-fee determination can be challenged in court.

Among the procedural safeguards imposed by *Hudson* is a requirement that a union with an agency-shop agreement must provide a mechanism by which nonmembers may present any objection concerning the calculation of their agency fee to "an impartial decisionmaker." 475 U.S. at 307. The majority in that case did not address the question of whether an objector must exhaust that procedure before bringing suit in court. The issue was mentioned only in the concurring opinion of Justice White, joined by Chief Justice Burger, which stated: "if the union provides for arbitration and complies with the other requirements specified in our opinion, it should be entitled to insist that the arbitration procedure be exhausted before resorting to the courts." *Id.* at 311.

As a result of the silence of the main opinion in *Hudson*, the lower courts "have had no small difficulty untying the

unions in the private sector under the statutory duty of fair representation. (App. 9a-10a).

Gordian knot binding the judicial and nonjudicial procedures" for resolving agency-fee disputes. *Lancaster v. Air Line Pilots Ass'n*, 76 F.3d 1509, 1521 (10th Cir. 1996). Two Circuits, the Seventh and Tenth, have held that exhaustion is required. The Seventh Circuit, considering the issue in the *Hudson* case itself after the remand from this Court, reasoned as follows:

Were we to accept plaintiffs' invitation and provide a hearing and judicial determination of the correctness of the fee, we would in effect render redundant and irrelevant the requirements that an impartial decisionmaker hear the dispute and that an escrow account be provided for the amounts reasonably in dispute while the challenge is pending. The proper procedure employs each of the prerequisites identified by the Supreme Court: the fair share notice provides the basis for a challenge to the fair share fee assessment; the impartial decisionmaker determines the correctness of the fee amount; and the escrow protects the challenger's funds pending such a decision. . . . Of course, the impartial decisionmaker's determination is not the final word on the challenge. If the decision is adverse to the plaintiffs, they may subsequently seek review by a federal court.

*Hudson v. Chicago Teachers Union, Local No. 1*, 922 F.2d 1306, 1314 (7th Cir.), *cert. denied*, 501 U.S. 1230 (1991) (emphasis in original). *Accord: Crosetto v. Heffernan*, 810 F. Supp. 966, 982 (N.D. Ill. 1992), *aff'd in part, vacated in part on other grounds sub nom. Crosetto v. State Bar of Wisconsin*, 12 F.3d 1396 (7th Cir. 1993), *cert. denied*, 511 U.S. 1129 (1994). The Tenth Circuit agreed, pointing out that, unless exhaustion was required, the impartial-decisionmaker requirement would be "largely a waste of time and money,"<sup>5</sup> and "we would more often be forced to micromanage the fee calculation

<sup>5</sup> Quoting *Bromley v. Michigan Educ. Ass'n*, 843 F. Supp. 1147, 1153 (E.D. Mich. 1994), *rev'd*, 82 F.3d 686 (6th Cir. 1996), *cert. denied*, — U.S. —, 117 S. Ct. 682 (1997).

in every case challenging a union assessment." *Lancaster v. Air Line Pilots Ass'n*, 76 F.3d at 1522.

The District of Columbia Circuit in this case has held directly to the contrary:

Although we recognize that Justice White raised a legitimate *practical* concern directed at the quasi-legislative scheme that the majority adopted in *Hudson*, we simply see no *legal* basis for forcing into arbitration a party who never agreed to put his dispute over federal law to such a process. Nor is there anything in the *Hudson* majority opinion that even suggests that the Court thought it was putting protesting agency shop employees in that position.

(App. 11a, emphasis in original; footnote omitted). *See also Bromley v. Michigan Educ. Ass'n*, 82 F.3d 686, 691-95 (6th Cir. 1996), *cert. denied*, — U.S. —, 117 S. Ct. 682 (1997) (exhaustion cannot be required); *Hohe v. Casey*, 956 F.2d 399, 406-09 (3d Cir. 1992) (exhaustion cannot be required as to "constitutional" issues); *Kidwell v. Transportation Communications Int'l Union*, 946 F.2d 283, 303 (4th Cir. 1991), *cert. denied*, 503 U.S. 1005 (1992) (noting circuit conflict without deciding the issue).

This conflict urgently requires resolution by this Court. As a result of the *Hudson* decision, virtually every union in the country has adopted an arbitration procedure for resolving agency-fee disputes. Most unions, like ALPA, use the services of the American Arbitration Association, which has adopted "Rules for Impartial Determination of Union Fees" for this specific purpose. In many unions, including ALPA, disputes concerning the calculation of agency fees recur every year, because a new calculation must be made each year based on that year's activities and expenses. Thus, the exhaustion question will arise again and again until it is finally resolved by this Court. This case presents the perfect opportunity to resolve it.

## II.

A corollary issue presented by this case is the degree of deference, if any, that a court should give the decision of a *Hudson*-mandated impartial decisionmaker in an agency-fee dispute. This issue, also, was left unresolved by this Court's decision in *Hudson*. The Court did say that "[t]he arbitrator's decision would not receive preclusive effect in any subsequent § 1983 action," 475 U.S. at 308 n.21, but it gave no hint as to whether any deference short of "preclusive effect" would be appropriate.

The district court in the present case analogized the role of the impartial decisionmaker required under *Hudson* to that of a court-appointed master under Fed. R. Civ. P. 53, whose findings of fact must be accepted by the court "unless clearly erroneous." Rule 53(e)(2). All legal issues, on the other hand, remain subject to determination *de novo*. (App. 22a, 31a). The court expressed the view that applying this standard of review here would

give effect to the procedures established by the Supreme Court in *Hudson* and prevent the situation whereby unions subject to the RLA would have to defend their agency shop fee calculations in two separate trials every year—both in an arbitration proceeding and in a lawsuit brought by nonmembers who elect not to participate in the arbitration.

(App. 31a-32a). Another district court relied on similar reasoning in adopting a deferential standard of review, but its decision was reversed on appeal. See *Bromley v. Michigan Educ. Ass'n*, 843 F. Supp. 1147, 1153-54 (E.D. Mich. 1994), *rev'd*, 82 F.3d 686 (6th Cir. 1996), *cert. denied*, — U.S. —, 117 S. Ct. 682 (1997).

The court of appeals in the present case, having decided the exhaustion issue in favor of respondents, found it unnecessary to decide the standard of review issue. Because the court found that respondents had submitted to arbitration only "under protest" and were not required to do so at all, it concluded that "the parties' dispute as

to the scope of review of the arbitrator's decision is beside the point." (App. 4a). Nevertheless, this Court should grant review of both questions. If the Court disagrees with the court of appeals on the issue of exhaustion, the question of what standard of review applies would have to be decided. Moreover, the latter question is independently important, and will continue to recur and cause confusion and needless litigation until it is finally resolved by this Court.

## III.

The third issue presented by this case is whether the auditing procedures used by an independent accounting firm in "verifying" the agency-fee disclosure statement required by *Hudson* are subject to judicial challenge and review. *Hudson* held that potential agency-fee objectors must be given "sufficient information to gauge the propriety of the union's fee." 475 U.S. at 306. The Court further explained: "The Union need not provide nonmembers with an exhaustive and detailed list of all its expenditures, but adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor." *Id.* at 307 n.18 (emphasis added).

The *Hudson* opinion gave no further indication of what the Court precisely meant by the phrase "verification by an independent auditor," and the issue has spawned extensive litigation in the federal courts.<sup>6</sup>

<sup>6</sup> See *Andrews v. Education Ass'n of Cheshire*, 829 F.2d 335, 340 (2d Cir. 1987); *Ping v. National Educ. Ass'n*, 870 F.2d 1369, 1374 (7th Cir. 1989); *Gwirtz v. Ohio Educ. Ass'n*, 887 F.2d 678 (6th Cir. 1989), *cert. denied*, 494 U.S. 1080 (1990); *Dashiell v. Montgomery Cty., Md.*, 925 F.2d 750, 754-57 (4th Cir. 1991); *Hohe v. Casey*, 727 F. Supp. 163, 165-67 (M.D. Pa. 1989), *aff'd in part, rev'd on other grounds*, 956 F.2d 399 (3d Cir. 1992); *Mitchell v. Los Angeles Unified School Dist.*, 739 F. Supp. 511, 514-16 (C.D. Cal. 1990); *Prescott v. County of El Dorado*, 915 F. Supp. 1080, 1089-90 (E.D. Cal. 1996).

In this case, ALPA's 1992 SGNE was accompanied by a "Report of Independent Accountants," signed by Price Waterhouse. (App. 118a-119a). The Report certified that "[w]e have audited the accompanying statement of germane and nongermane expenses of Air Line Pilots Association for the year ended December 31, 1992," and went on to describe the audit and its result:

We conducted our audit in accordance with generally accepted auditing standards which require that we plan and perform the audit to obtain reasonable assurance about whether this statement is free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements assessing the accounting principles used and significant estimates made by management and evaluating the overall financial statement presentation. We believe that our audit provides a reasonable basis for the opinion expressed below.

\* \* \* \*

In our opinion, the aforementioned statements present fairly, in all material respects, the germane and nongermane expenses of the Air Line Pilots Association for the year ended December 31, 1992, based on the definitions, significant factors, and management assumptions referred to above.

(App. 118a-119a).

The district court held that this certification, in itself, satisfied the "verification" requirement. (App. 51a-52a). Respondents, however, contended that Price Waterhouse's auditing procedures were inadequate, and the court of appeals held that they are entitled to a trial of this issue:

The professional adequacy of the *Hudson* audit is certainly a proper subject for review by a judge or an arbitrator. ALPA would have us hold that, in the absence of allegations of fraud or willful misconduct, a court or arbitration panel should not inquire whether the *Hudson* audit was properly performed.

Although *Hudson* does not require that every underlying record and document be discoverable by objecting members' accounting experts, as [plaintiffs' accountant] suggests, we disagree that the methodology of the auditor may not be questioned for anything but fraud or intentional deception. *Hudson* did not stand for the proposition that a rubber stamp by an accountant stating "this was audited" meets the constitutional minimum it envisioned.

(App. 17a-18a).

The court of appeals' ruling would require a trial not merely of the correctness of the data contained in the SGNE, but also the adequacy of the procedures used by Price Waterhouse in performing its audit of the SGNE. At such a trial, both sides would present expert accounting testimony concerning the relevant standards and practices of the accounting profession. The trial court would then have to choose between the conflicting accountants' opinions, with no guidance other than this Court's statement that the SGNE must be "verifi[ed] by an independent auditor." *Hudson*, 475 U.S. at 307 n.18.

We doubt that the *Hudson* Court intended to place the federal courts in the position of mediating this kind of dispute between accountants. But whether we are correct or not, the matter should be clarified by this Court. Given the frequency of litigation concerning agency fees, the lower courts should not be required to speculate about what the Court truly meant by the verification requirement.

#### IV.

The fourth and final issue in this case is whether union advocacy before government agencies on matters that directly impact the working conditions of employees the union represents should be considered "germane to collective bargaining" and therefore appropriately chargeable to agency-fee objectors, or whether, as the court of appeals held, such activities are "political" in nature and therefore not chargeable.

The issue arises in this case with respect to ALPA's activities in the field of air safety. The promotion of air safety is a major ALPA goal, and one that ALPA pursues in a wide variety of ways. ALPA negotiates provisions in its collective bargaining agreements relating to air safety; maintains a safety committee at each airline to monitor airline operations and work with management on safety issues and problems as they arise; participates in airline accident investigations conducted by the National Transportation Safety Board; conducts ongoing studies in a wide range of technical areas relating to air safety and publishes the results of such studies to the pilots and the industry; works with aircraft manufacturers to promote air safety in the design of new aircraft or improvements in existing aircraft; participates in rulemaking and other administrative proceedings before government agencies on matters affecting air safety; and works informally with government regulators on safety-related issues.

The object of all of ALPA's safety-related activities is to protect and enhance the on-the-job safety of the pilots it represents. ALPA pursues this goal both with the airlines and with the government because the pilot's working life and environment are controlled by both. For example, government regulations determine:

—the maximum number of hours a commercial pilot may be scheduled to fly during any day, week, month, and year, and the minimum amount of rest he must have between flight assignments (14 C.F.R. § 121.470 *et seq.*);

—the specific medical standards that commercial pilots must meet, and the nature and frequency of the medical testing they must undergo (*id.* § 67.1 *et seq.*);

—the qualifications a pilot must meet to be certified to fly each particular aircraft type (*id.* § 61.61 *et seq.*);

—the frequency and nature of the in-flight proficiency tests a pilot must pass, including the specific maneuvers he must perform (*id.* §§ 61.57-61.58);

—the age at which a commercial pilot must retire (*id.* § 121.383(c));

—detailed rules of flight operation, such as minimum altitudes and speeds, rights of way, communications with air traffic control, and many other matters relating to the performance of a pilot's flight duties (*id.* § 91.101 *et seq.*).

These are all matters which, in the absence of regulation, would be subject to normal collective bargaining. As they are actually determined in large measure by government regulation, the only way ALPA can effectively represent the pilots' interests with respect to such matters is to advocate those interests both to the appropriate agencies of government and to the airlines themselves. The airlines forcefully present their views to the government, and if ALPA did not do the same the pilots would have no effective voice in these matters.

To the extent that ALPA negotiates directly with the airlines on matters relating to safety, no one disputes that the costs can be charged to agency-fee payers. The court of appeals held, however, that when ALPA pursues the same safety goals through advocacy before government agencies, it is engaging in "lobbying" and the costs cannot be charged to agency-fee objectors:

That the subject of safety is taken up in collective bargaining hardly renders the union's government relations expenditures germane. Under that reasoning, union lobbying for increased minimum wage laws or heightened government regulation of pensions would also be germane. Indeed, if the union's argument were played out, virtually all of its political activities could be connected to collective bargaining; but the federal courts, including the Supreme Court, have been particularly chary of treating as germane union expenditures that touch the political world.

(App. 14a-15a).

This holding is in conflict with the approach taken by this Court in *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991), in which the issue was the chargeability of lobbying activities by a union representing public teachers. Although the Court concluded that the particular lobbying activities at issue in that case were not sufficiently related to collective bargaining, it acknowledged that some lobbying activities by a union representing public employees would be chargeable to agency-fee objectors:

The Court of Appeals determined that unions constitutionally may subsidize lobbying and other political activities with dissenters' fees so long as those activities are "pertinent to the duties of the union as a bargaining representative." . . . In reaching this conclusion, the court relied upon the inherently political nature of salary and other workplace decisions in public employment. "To represent their members effectively," the court concluded, "public sector unions must necessarily concern themselves not only with negotiations at the bargaining table but also with advancing their members' interests in legislative and other 'political' arenas." . . .

This observation is clearly correct. Public-sector unions often expend considerable resources in securing ratification of negotiated agreements by the proper state or local legislative body. . . . Similarly, union efforts to acquire appropriations for approved collective-bargaining agreements often serve as an indispensable prerequisite to their implementation. . . . The dual roles of government as employer and policy-maker in such cases make the analogy between lobbying and collective bargaining in the public sector a close one.

*Id.* at 519-20 (citations omitted).

Admittedly, *Lehnert* involved public employees, whose lobbying activities would be aimed directly at the public agency that controls their wages and working conditions. But airline pilots, although privately employed, are in

essentially the same relationship to the government when it comes to matters of air safety. From the moment a pilot reports for duty to the moment he is released, his entire working environment and his every action on the job are determined by two sets of interrelated and interdependent rules—those promulgated by the employer and those promulgated by the government.

The court of appeals argued that if ALPA's "lobbying" on safety issues were to be treated as germane to collective bargaining, "the *Lehnert* exception would swallow the *Lehnert* rule." (App. 15a). We respectfully disagree. Many political activities commonly pursued by unions—for example, supporting candidates for public office or promoting general legislation dealing with such issues as medicare, social security, welfare, foreign trade, and the like—are far removed from collective bargaining, and therefore are covered by the rule, not the exception. There is a bright line between such general political activities, on the one hand, and, on the other, advocacy that concerns matters that directly impact the working conditions of employees that a union represents. When this Court has ruled, in prior cases, that costs associated with "political" activities and "lobbying" cannot be charged to agency-fee objectors, it was dealing with the former type of activity, not the latter. See *International Ass'n of Machinists v. Street*, 367 U.S. 740, 744 (1961) (funds used "to finance the campaigns of candidates for federal and state offices . . . and to promote the propagation of political and economic doctrines, concepts and ideologies"); *Brotherhood of Ry. Clerks v. Allen*, 373 U.S. 113, 117 (1963) (funds used for political and legislative purposes "not reasonably necessary or related to collective bargaining"). Just last term, the Court characterized this line of cases as holding that "compelled contributions for political purposes *unrelated to collective bargaining* implicated First Amendment interests . . ." *Glickman v. Wileman Bros. & Elliott, Inc.*, — U.S. —, 117 S. Ct. 2130, 2139 (1997) (emphasis added).

It is possible, as the court of appeals pointed out, that not all pilots will necessarily always agree with ALPA's position or tactics with respect to specific regulatory matters relating to air safety—although respondents in this case have never expressed any specific disagreement. A union is not restricted to those actions that are unanimously supported by its constituents: "The complete satisfaction of all who are represented is hardly to be expected." *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953).

The furtherance of the common cause leaves some leeway for the leadership of the group. As long as they act to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group's strategy.

*Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209, 222-23 (1977) (quoting *International Ass'n of Machinists v. Street*, 367 U.S. 745, 778 (1961) (concurring opinion)).

In short, we believe the court below misconstrued and misapplied the applicable decisions of this Court in determining that ALPA's advocacy before government agencies concerning issues relating to air safety was not chargeable to agency-fee objectors. At the very least, there is an urgent need for clarification by this Court of the criteria for determining when a union's advocacy before government entities is sufficiently related to its collective bargaining function to be considered "germane to collective bargaining."

## CONCLUSION

For the reasons stated, the writ of certiorari should be granted.

Respectfully submitted,

JERRY D. ANKER

(Counsel of Record)

CLAY WARNER

Air Line Pilots Association

Legal Department

1625 Massachusetts Avenue, N.W.

Washington, D.C. 20036

(202) 797-4087

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1997

AIR LINE PILOTS ASSOCIATION,  
*Petitioner,*  
v.

ROBERT A. MILLER, *et al.*,  
*Respondents.*

Petition for Writ of Certiorari to the  
United States Court of Appeals  
for the District of Columbia Circuit

APPENDIX TO  
PETITION FOR WRIT OF CERTIORARI

JERRY D. ANKER  
*(Counsel of Record)*  
CLAY WARNER  
AIR LINE PILOTS ASSOCIATION  
Legal Department  
1625 Massachusetts Avenue, N.W.  
Washington, D.C. 20036  
(202) 797-4087



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**APPENDIX**

**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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Argued January 16, 1997

Decided March 14, 1997

No. 96-7033

ROBERT A. MILLER, *et al.*,  
*Appellants*

v.

AIR LINE PILOTS ASSOCIATION,  
*Appellee*

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Appeal from the United States District Court  
for the District of Columbia  
(91cv3161)

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Before: SILBERMAN, WILLIAMS, and ROGERS, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge SILBERMAN*.

SILBERMAN, *Circuit Judge*: Nonunion pilots appeal the judgment of the district court, which largely relied on an arbitrator's award, as to the legality of the union's agency shop fees. We reverse.

I.

Appellee Air Line Pilots Association (hereinafter ALPA or the union), is the exclusive collective bargaining representative of all pilots employed by Delta. In 1991, ALPA and Delta entered into an "agency shop"

agreement under the Railway Labor Act (RLA), effective at the start of 1992, which requires all pilots who choose not to be members of ALPA to pay a "service charge" to ALPA "as a contribution for the administration of the [collective bargaining agreement] and the representation of [all] employees."

ALPA collected fees from appellants, 153 Delta pilots who have not joined the union (hereinafter the pilots), by following the procedures contained in its operating manual, Policies and Procedures Applicable to Agency Fees. The manual, in accordance with federal law, allows nonmembers to object to fees used for purposes not germane to collective bargaining. ALPA charged nonmembers fees approximately 8% less than union dues from January 1 through June 30, 1992. That figure, which was an estimate, was based on 1990 outlays. But for the latter half of 1992, the union discounted the pilots' fees by about 17% because of newly available figures from 1991. ALPA sent each nonmember pilot a copy of its Policies and Procedures with both the 1990 and 1991 statements. When the actual figures for 1992 became available, the union determined that 19% of its expenses for the year were nongermane and gave objecting pilots an adjusted credit or rebate with interest.

Appellants, still dissatisfied with the union's calculations and procedures, protested. The union, treating that protest—despite appellants' objection—as a request for arbitration under the union's Policies and Procedures, initiated arbitration proceedings. The Policies and Procedures specify that the American Arbitration Association (AAA) Rules for Impartial Determination of Union Fees govern such arbitrations, so, at the union's request, the AAA appointed an arbitrator in accordance with its rules from "a special panel of arbitrators experienced in employment relations." A number of the pilots had previously filed suit (before the agency shop agreement went

into effect) against the union in federal district court and, wanting federal court resolution of all of its disputes regarding union fees, it asked the arbitrator not to proceed and sought a district court injunction to stop the arbitration. The district court denied the injunction, and the arbitrator refused to delay. The pilots' attorney consequently entered only a conditional appearance in the arbitration.

The arbitrator sustained most of the challenged union determinations as to which of its expenses were germane. Ninety-one of the 158 pilots who participated in the arbitration (either willingly or unwillingly) were parties in the district court suit; the other 67 of those who participated did not challenge the arbitrator's award. Sixty-two more who did not participate in the arbitration proceedings intervened in district courts. We therefore have before us only the pilots who appeared before the arbitrator under protest or those who refused to do so at all.

The pilots who had been represented in arbitration had sought discovery, but the arbitrator refused to utilize his authority under the AAA rules to permit such. In district court, ALPA objected to the magistrate's discovery order requiring the union to produce all documents identifying the nature of and expenses related to 20 sample projects; it offered instead what the pilots regarded as impractical: all of its 1992 expense records. The district court cut short the discovery dispute by granting summary judgment against the pilots on almost all of their claims, with the exception of the effect of arbitration on the proceeding. The district court received additional briefing on the latter and subsequently ruled arbitration was required. Relying on the arbitrator's factual findings, the district court affirmed ALPA's method of recordkeeping and its treatment of overhead expenses.

## II.

Appellants' most fundamental quarrel with the district court's opinion is directed at its conclusion that dissenter pilots were obliged to "exhaust" the arbitration procedures the union invoked before coming to court. (It will be recalled that some of appellants declined to go to arbitration and the others complied only under protest.) If they are correct on that issue, then the parties' dispute as to the scope of review of the arbitrator's decision is beside the point. Appellants' argument is simply this: We cannot be required to put to an arbitrator our claim against the union under federal law because we have never agreed to do so. That general proposition has been widely recognized by federal courts in a variety of circumstances. See, e.g., *AT&T Technologies, Inc. v. Communication Workers of America*, 475 U.S. 643, 648-49 (1986) (citing the *Steelworkers Trilogy*); *Gateway Coal Co. v. United Mine Workers of America*, 414 U.S. 368, 374 (1974); *Blake Const. Co., Inc. v. Laborers' Int'l Union of North America, AFL-CIO*, 511 F.2d 324, 327 (D.C. Cir. 1975). We have recently held that dissident agency shop telephone company employees, similarly challenging an agency fee, were not obliged to accept a union's arbitration procedure in accordance with the union's constitution since they were not members of the union and never agreed to submit their dispute to arbitration. *Abrams v. Communications Workers of America*, 59 F.3d 1373, 1382 (D.C. Cir. 1995).

The union and the district court, however, rely on another of our recent decisions, *Communication Workers of America v. American Telephone & Telegraph Co.*, 40 F.3d 426 (D.C. Cir. 1994), in which we held that employees wishing to challenge decisions of pension plan administrators under federal law (ERISA) were obliged to exhaust administrative remedies before going to court. And the union would have us distinguish *Abrams* because

the agency shop agreement there was governed by § 8 (a)(3) of the National Labor Relations Act (NLRA), whereas in this case the parties are covered by § 2, Eleventh of the RLA. Under the RLA—but not the NLRA, according to the union—agency shop agreements threaten to trench on the First Amendment rights of those nonunion workers who are required, in part by operation of federal law, to make payments to the union. Since the dividing line between germane and nongermane activities has constitutional significance under the RLA, the union is *obliged* per the Supreme Court's decision in *Chicago Teachers Union Local No. 1 v. Hudson*, 475 U.S. 292 (1986), to offer a neutral arbitrator to dissident employees for prompt review of the union's allocation of its expenses between those categories. Therefore the union contends the dissidents should be reciprocally required to "exhaust" arbitration procedures; otherwise, the union would be forced frequently to litigate in both fora simultaneously—if some dissidents chose arbitration and others the federal court to pursue similar claims—causing it great expense and confusion.

We can readily distinguish *Communications Workers*; that parallels a true exhaustion case whereas this does not. The doctrine of exhaustion of administrative remedies typically is applied to ensure that senior officials in a government agency have authoritatively ruled, in accordance with available procedures, on an issue that a party attempts to bring to court based on a preliminary decision of a subordinate official. See, e.g., *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938). In *Communications Workers*, we merely applied that reasoning to ERISA-governed pension plans. There, plan administrators had denied benefits to a claimant. But the plan provided for review of the administrators' decision by an Employee Benefit Committee, and we were unwilling to indulge the plaintiff's contention that an appeal to the committee necessarily would have been futile. Since under ERISA

discretionary decisions of plan administrators determining eligibility for benefits or interpreting the terms of the plan are reviewed quite deferentially (abuse of discretion), *see Firestone Tire and Rubber Co. v. Burch*, 489 U.S. 101, 115 (1989), we thought it particularly important that the decision we evaluated represent the considered and reasoned view of the highest plan authority. Thus, we extended the exhaustion doctrine to this nongovernmental structure. *Communications Workers*, 40 F.3d at 433.

This case, however, is far removed from the exhaustion paradigm. The arbitrator is not a senior official in the union hierarchy, and even if he were, there is no statutory ground to defer to either the union or the arbitrator on any of the issues presented in the case. The only reason an arbitrator's decision is normally afforded deference in a federal court is because the parties have *agreed* to put their dispute to him or her. *Cf. id.* at 434. The union does claim that the arbitrator's decision is entitled to deference but, in truth, the union's reasoning is circular. The arbitrator's decision, it is argued, should not be reviewed *de novo*, because if it were reviewed *de novo*, it would make little sense to force the pilots to go to arbitration in the first place—exposing the real question as whether the pilots were required to proceed to arbitration at all.

We therefore return to the union's argument that the pilots, in this situation, were obliged to go to arbitration because the Supreme Court has compelled the union to offer arbitration to protect agency shop employees' constitutional rights, and it would be inconsistent with that scheme to force the union to defend itself before both an arbitrator and a federal court. The necessary corollary to that argument is the union's asserted distinction of *Abrams* as limited to the NLRA.

To understand the union's rather intricate position, it is necessary to analyze the basis for and the implications

of the Supreme Court's determination in *Hudson* that a union representing public employees must offer nonmembers in an agency shop certain procedural protections to ensure that their First Amendment rights are not infringed. Previously, in *Abood v. Detroit Board of Educ.*, 431 U.S. 209 (1977), the Court had held that, although public employers could establish agency shops in which all employees, whether union members or not, are required to pay their share of the union's collective bargaining costs, nonmember employees, in turn, were entitled to "prevent the Union's spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative." *Id.* at 234. *See also Brotherhood of Railway and Steamship Clerks v. Allen*, 373 U.S. 113, 118-19 (1963); *International Ass'n of Machinists v. Street*, 367 U.S. 740, 769-70 (1961). In *Hudson*, the Court developed a set of requirements which would "protect[] the basic distinction drawn in *Abood*" and keep the agency shop from infringing on the First Amendment. *Hudson*, 475 U.S. at 302-03 & n.12. Specifically, *Hudson* obliges those unions to provide an adequate explanation for the basis of their fees (including the major categories of expenses and verification by an independent auditor), "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker," and an escrow account in which fees are placed pending resolution of any fee disputes. *Id.* at 307, n.18 & 310. Justice White, concurring for himself and Chief Justice Burger, suggested the very position the union urges on us. He said, "if the union provides for arbitration and complies with the other requirements specified in our opinion, it should be entitled to insist that the arbitration procedure be exhausted before resorting to the courts." *Hudson*, 475 U.S. at 311 (White, J., concurring).

Although *Hudson's* constitutional analysis was predicated on the premise that the union represented government workers and therefore its agency shop agreement with public employers' constituted "state action," the parties agree that the *Hudson* requirements similarly obtain vis-a-vis unions who negotiate agency shop agreements with private employers covered by the RLA. That is so because the Supreme Court in 1956 observed that the provision of the Railway Labor Act authorizing such agreements had to be read for constitutional reasons as limiting a union's ability to collect "dues . . . as a cover for forcing ideological conformity or other action in contravention of the First Amendment." *Railway Employees' Dep't v. Hanson*, 351 U.S. 225, 232, 238 (1956). The Constitution was thought implicated because agency shop agreements under the RLA carried the imprimatur of federal law. *Id.*; see also *Lancaster v. Air Line Pilots Ass'n Int'l*, 76 F.3d 1509, 1519 (10th Cir.1996); *Crawford v. Air Line Pilots Ass'n Int'l*, 992 F.2d 1295 (4th Cir.), *cert. denied*, 510 U.S. 869 (1993).

What is hotly disputed, however, is whether the obligation to provide prompt review by an impartial decision-maker, rooted as it is in the protection of constitutional rights, extends to unions who gain agency shop agreements under § 8(a)(3) of the NLRA. If it is not, then *Abrams'* refusal to force the telephone workers to go to arbitration is distinguishable, the union claims, because the union there was not obliged *constitutionally* to offer arbitration. We are therefore backed into one of the more troublesome issues in labor law today and on which the circuits seem split—what is the legal basis and nature of a union's obligations to agency shop employees under the NLRA. Compare *Price v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America*, 927 F.2d 88, 92 (2d Cir.) (finding no state action in an NLRA case to implicate *Hudson's* requirements), *cert. denied*, 502 U.S. 905

(1991), with *United Food and Commercial Workers Local 951 v. Mulder*, 31 F.3d 365 (6th Cir. 1994) (assuming that *Hudson's* requirements apply in a case under the NLRA), *cert. denied*, 115 S. Ct. 1095 (1995).

As the union points out, however, this is not an entirely new question for us; we determined back in 1983 in *Kolinske v. Lubbers*, 712 F.2d 471 (D.C. Cir.) (holding the denial of strike benefits to nonstriking, nonmembers not unconstitutional) that under the NLRA an agency shop agreement does not amount to state action. We distinguished the Supreme Court's decisions discerning state action under the Railway Labor Act because that statute not only authorizes agency shops—and therefore puts a federal imprimatur on a collective bargaining agreement forcing an unwilling employee to pay a union an agency fee—it also preempts state law. *Id.* at 476-77. The NLRA, by contrast, in § 14(b) provides an option by which state law may ban a union shop and override the federal scheme. On reflection, it is not apparent why it is any less "state action," meaning governmental action, if both the federal and state governments combine (when the state chooses not to ban union shops) to provide a legal regime whereby an employee who refuses to join a union is still obliged to pay an agency fee. Nevertheless, it is not open to us to depart from our prior holding.

Still, the Constitution's applicability to union shop clauses under the NLRA is not determinative as to the union's obligation to provide *Hudson* procedures to nonmembers. Subsequent to *Kolinske*, the Supreme Court decided the crucially important *Communication Workers v. Beck*, 487 U.S. 735 (1988), and although it declined to determine whether the Constitution had the same application to agency shop agreements under the NLRA as it does under the RLA, *id.* at 761, it did hold that the statutory authorization to operate union shops under § 8(a)(3) was coextensive with that under § 2, Eleventh

of the RLA. *Id.* at 752. Both statutes, similarly worded, permit unions to reach agreements with employers that compel employees to pay agency shop fees only to the extent that those fees are "necessary to finance collective bargaining activities." *Id.* at 759-62. Any greater exaction would violate the union's legal duty of fair representation. *Id.* at 742-43, 762-63. We see no reason why this statutory duty of fair representation owed to nonmember agency shop employees carries any fewer procedural obligations than does a constitutional duty. We therefore do not believe it is possible to distinguish *Abrams* on the ground that the union's proposed arbitration of the dispute there was wholly voluntary. We recognized as much in *Abrams*, albeit in passing: "Although in *Hudson* the challenge to the union agency fee was made on constitutional grounds, its holding on objection procedures applies equally to the statutory duty of fair representation inasmuch as the holding is rooted in '[b]asic considerations of fairness, as well as concern for the First Amendment rights at stake.'" *Abrams*, 59 F.3d at 1379 n.7 (quoting *Hudson*, 475 U.S. at 306).

We do not think, then, that the union's attempted distinction of *Abrams* is persuasive, but to be fair, that case is not wholly dispositive because we were not faced with the argument that the union mounts here, which is based on Justice White's concurrence in *Hudson*. It is an argument that has found a mixed response: The circuits are split as to whether a union, obliged by federal law to offer *Hudson*-style arbitration to nonmembers challenging the amount of agency fees that they are charged, is entitled to insist on "exhaustion" before the dissident employees come to federal court. Compare *Lancaster v. Airline Pilots Ass'n Int'l*, 76 F.3d 1509, 1521-23 (10th Cir. 1996) (reading *Hudson*, including Justice White's concurrence, to require excusable exhaustion of arbitration to avoid the wasteful expenditure of time and money) and *Hudson v. Chicago Teachers Union, Local No. 1*, 922 F.2d 1306, 1314 (7th Cir.) (federal courts

should not review fee calculations at the notice stage because it would involve the courts in the micromanagement of fee calculation), *cert. denied*, 501 U.S. 1230 (1991), with *Bromley v. Michigan Educ. Ass'n*, 82 F.3d 686, 694 (6th Cir. 1996) (criticizing the district court's opinion in the present case and holding that there is no exhaustion requirement), *cert. denied*, 65 U.S.L.W. 3457 (U.S. Jan. 6, 1997) (No. 96-429), and *Hohe v. Casey*, 956 F.2d 399, 409 (3d Cir. 1992) (discussing the issue in dicta and reading *Hudson* as only requiring arbitration as an alternative, not a precursor, to litigation). We observed this division once before in *Beckett v. Airline Pilots Ass'n*, 995 F.2d 280, 285 (D.C. Cir. 1993), but we did not have to choose sides in that case. Here we do. Although we recognize that Justice White raised a legitimate *practical* concern directed at the quasi-legislative scheme that the majority adopted in *Hudson*, we simply see no *legal* basis for forcing into arbitration a party who never agreed to put his dispute over federal law to such a process. Nor is there anything in the *Hudson* majority opinion that even suggests that the Court thought it was putting protesting agency shop employees in that position.<sup>1</sup> We therefore align ourselves with the Sixth and Third Circuits in holding that an employee who wishes to bring an action in federal court is not obliged to proceed first to arbitration, at the union's option.

That does not mean we are insensitive to the union's problem of defending its actions simultaneously in two separate fora. There is a rather strange relationship between the union and the dissenting pilots; it is certainly not the kind that gives rise to a continuing smooth recourse to an agreed-upon method of resolving disputes. But surely given the disincentives both sides face, it is not inconceivable that all the dissenting pilots could be

<sup>1</sup> Although the majority did not explicitly reject Justice White's concern, it did specify that "[t]he arbitrator's decision would not receive preclusive effect in any subsequent § 1983 action." *Hudson*, 475 U.S. at 308 n.21.

persuaded to agree to arbitration, perhaps if the pilots felt they had more say in the selection of the arbitrator and the rules governing the proceeding. It may well be, for instance, that the arbitrators chosen by the AAA from a group "experienced in labor matters" would not be perceived as typically sympathetic to such plaintiffs (or their counsel). The union may well entertain visceral objections to engaging in a kind of collective bargaining over dispute resolution procedures with the non-members, but practical concerns might well, as the union itself emphasizes, predominate.

Assuming, however, that the union faces continuous litigation in federal court, it does not follow that it will necessarily be obliged simultaneously to offer arbitration. *Hudson*, it should be remembered, did not require arbitration *per se*. Rather, it required a "reasonably prompt decision by an impartial decisionmaker." 475 U.S. at 307. If unions are brought into federal court each year on agency fee challenges as ALPA fears, presumably the same district judge will hear those cases. To the extent the court gains familiarity with the union's procedures and practices, federal court decisions themselves may satisfy *Hudson*'s requirement if the proceedings move relatively quickly. The unions can also assist the courts in speeding up the process by making pre-trial concessions regarding discovery and other time-sensitive matters. The Court in *Hudson* seemed to recognize this very possibility when it noted that "[c]learly, . . . if a State chooses to provide extraordinarily swift judicial review for these challenges, that review would satisfy the requirement of a reasonably prompt decision by an impartial decisionmaker." *Id.* at 308 n.20.

Effective use of the class action procedures may also minimize ALPA's concerns. Nonmembers may well elect to bring their claims as a class. *See, e.g., Abrams*, 59 F.3d at 1378; *Hudson*, 922 F.2d at 1308. A class consisting of all agency shop nonmembers can be certified to chal-

lenge the adequacy of a union's notice, *see Abrams*, 59 F.3d at 1378, and courts may also certify a class of non-members who have specifically objected to the exaction of fees without running afoul of the Supreme Court's decision in *Street*. *Id.*

In sum, we think the parties and their counsel may well be able to devise procedures that will provide dissenting pilots with their legal rights and yet not unduly burden the union.

### III.

Although our decision sustaining appellants' right not to go to arbitration necessarily means this case must be remanded to the district court—the arbitrator's decision is no longer a part of the legal picture—there are certain issues presented by the parties that are straight questions of law and therefore should be decided now; there is no reason to remand. Perhaps the most important of those questions relates to ALPA's air safety "activities," which the union claims are germane to collective bargaining. The arbitrator and the district judge—apparently resting her decision on an independent legal analysis—agreed with the union. But the pilots claim that they are being charged in part with certain union activities that involve lobbying government agencies and, in accordance with *Hudson*'s reasoning, these activities cannot be considered germane to collective bargaining.

The union, although it objects to appellants' use of the term "lobbying," does not dispute that a portion of its expenses involves its contacts with government agencies and Congress concerning the union's views as to appropriate federal regulation of airline safety—which even includes intervention with the President and members of the Senate concerning appointments to the National Transportation Safety Board. ALPA contends, however, that its government relations activities are interconnected with those airline safety issues that animate much of its collec-

tive bargaining and therefore they should be regarded as germane to that bargaining.

There are major difficulties with the union's position. If there is any union expense that, given the logic of *Hudson* and its progeny, must be considered furthest removed from "germane" activities, it is that involving a union's political actions. After all, whether one considers the RLA's limitation on the union's use of nonmembers' compelled agency fees to be constitutionally required or inspired, it is nonetheless nonmembers' First Amendment-type interests that are protected. And it is hard to imagine those interests more clearly placed in jeopardy than when the union uses the dissidents' money to pursue political objectives. The union would have us see its lobbying on safety-related issues as somehow nonpolitical because all pilots share a common concern with these activities. But we cannot possibly assume that to be true. All pilots are surely interested in airline safety, but it would certainly not be unexpected that pilots would have varying views as to the desirability of governmental regulation—including those regulations of airlines that pertain to safety. The benefits of any regulation include trade-offs, and certain pilots might be reluctant to pay the costs either directly or indirectly of increased regulations, just as others might oppose relaxed regulations that could expand work opportunities. Some, of course, might even object to such regulations on principle.

That the subject of safety is taken up in collective bargaining hardly renders the union's government relations expenditures germane. Under that reasoning, union lobbying for increased minimum wage laws or heightened government regulation of pensions would also be germane. Indeed if the union's argument were played out, virtually all of its political activities could be connected to collective bargaining; but the federal courts, including the Supreme Court, have been particularly chary of treating as

germane union expenditures that touch the political world. See *Beckett v. Air Line Pilots Ass'n*, 59 F.3d 1276, 1281 (D.C. Cir. 1995) (Silberman, J., concurring) (observing that the Supreme Court treats litigation as non-germane perhaps because it regards litigation as a continuation of the political process). See also *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 516 (1991) (expenses are not germane to collective bargaining "at least in the private sector" if they involve political or ideological activities); *Ellis v. Brotherhood of Ry., Airline and Steamship Clerks, Freight Handlers, Express & Station Employees*, 466 U.S. 435, 447-48 (1984); *Street*, 367 U.S. at 768.

To be sure, in *Lehnert* the Supreme Court recognized an exception to this principle for public sector unions because "[t]he dual roles of government as employer and policymaker in such cases make the analogy between lobbying and collective bargaining in the public sector a close one." 500 U.S. at 519-20. ALPA would have us extend this limited exception to this case because safety standards can be the result of either collective bargaining or government action and indeed, the latter may foreclose the former. But, as we have explained, that extension of the *Lehnert* exception would swallow the *Lehnert* rule. On remand, therefore, the district court should draw a line between safety-related collective bargaining expenditures and those relating to the union's government relations.

#### IV.

The pilots raise a number of additional claims, some of which can also be decided as a matter of law—others of which must be remanded. The 1990 and 1991 statements allegedly constituted inadequate notice under *Hudson* because they were not "audited"—even though the 1992 statement, under which fees were ultimately levied, was. We agree with ALPA that the pilots have failed to establish that they have standing to raise this claim, because the

pilots were not injured by the alleged inadequacy. They did not suffer as a result of inadequate information on which to base an objection because they did submit a timely objection. And ALPA rebated the difference plus interest, from an escrow account, between the amount of actual expenses in 1992 and the estimates from the 1990 and 1991 statements. A formally audited notice would have changed nothing because Price Waterhouse verified ALPA's accounting in 1990 and 1991, and the pilots have not alleged that a more formal audit would have produced a different collection of fees initially—they complain only that the 1992 fees were ultimately lower than the estimates made from 1990 and 1991.

ALPA also did not provide the pilots with "reasonably prompt" review, under the pilots' rationale, because their first opportunity to challenge the 1992 statement was in mid-1993, and they could not challenge the 1990 or 1991 statements earlier than that. We agree with ALPA that since the pilots did not request arbitration with respect to either the 1990 or 1991 statements, and since they have protested attending *any* arbitration before being allowed in court, they cannot now complain that the arbitration should have been available earlier. This problem will not recur in any event because the issue arose in this case only because the agency shop agreement did not take effect until 1992. In the future pilots can, if they wish, request arbitration in any given year of the prior year's statement, because that same statement will determine both their final agency fee for the preceding year and their tentative fee for the current year.

The pilots also contend that the district court erred in granting ALPA summary judgment on their challenge to the audit of the 1992 statement. The district court interpreted the pilots' claim to be that Price Waterhouse did not audit the "germane/nongermane calculation" nor "examine . . . [ALPA's] expenditures in each project code." The court reasoned that auditors need not make

the legal determination of whether an expense is germane. It further concluded, after reading the declaration of the pilots' expert, that the pilots conceded that Price Waterhouse's review "provid[ed] the assurance that sums allocated to project codes are actually expended in support of those codes." This was enough, in the district judge's view, to permit summary judgment for ALPA.

Insofar as the district court rejected the pilots' request that an auditor make legal determinations of whether expenses are germane or not germane, we agree. See *Dashielle v. Montgomery County*, 925 F.2d 750, 755 (4th Cir. 1991); *Gwirtz v. Ohio Educ. Ass'n*, 887 F.2d 678, 682 n.3 (6th Cir. 1989), *cert. denied*, 494 U.S. 1080 (1990); *Ping v. National Educ. Ass'n*, 870 F.2d 1369, 1374 (7th Cir. 1989); *Andrews v. Educ. Ass'n of Cheshire*, 829 F.2d 335, 340 (2d Cir. 1987). Irving Ross, appellants' expert, devoted most of the space in his declaration to criticizing Price Waterhouse's inadequate evaluation of whether expenses were properly treated by ALPA as germane and whether *Hudson* was satisfied. These are matters of law, not accounting, and we cannot expect accountants to conduct the analysis of whether an expense was necessarily or reasonably incurred as part of the union's collective bargaining duties. *Hudson* auditors are not different from other auditors whose "usual function is to ensure that the expenditures which the union claims it made for certain expenses were actually made for those expenses." *Andrews*, 829 F.2d at 340. There is, therefore, nothing legally deficient with Price Waterhouse's reliance on the "definitions, significant factors, and management assumptions" made by ALPA in dividing its expenses between germane and nongermane.

But the pilots claim that Ross also questioned whether Price Waterhouse violated generally accepted accounting principles in the *manner* by which it conducted the audit, and therefore his declaration created a factual dispute immune from summary judgment. The professional adequacy of the *Hudson* audit is certainly a proper subject

for review by a judge or an arbitrator. ALPA would have us hold that, in the absence of allegations of fraud or willful misconduct, a court or arbitration panel should not inquire whether the *Hudson* audit was properly performed. Although *Hudson* does not require that every underlying record and document be discoverable by objecting members' accounting experts, as Ross suggests, we disagree that the methodology of the auditor may not be questioned for anything but fraud or intentional deception. *Hudson* did not stand for the proposition that a rubber stamp by an accountant stating "this was audited" meets the constitutional minimum it envisioned.

In that regard, we read Ross' declaration as creating a factual dispute over the adequacy of Price Waterhouse's audit, including, as the district court phrased it, the propriety of the "assurance that the sums allocated to project codes were actually expended in support of those codes." Ross challenged Price Waterhouse's methodology by noting that the audit itself was meant to assist a particular group of users—the nonmembers—in determining whether or not to object to the agency shop fee. Under the particular form of audit selected by Price Waterhouse,<sup>2</sup> the auditor is advised:

When expressing an opinion on one or more specific elements, accounts, or items of a financial statement, the auditor should plan and perform the audit and prepare his or her plan report with a view to the purpose of the engagement.

Ross contended that Price Waterhouse planned and performed the audit in a manner contrary to the needs of its users and therefore below auditing standards. Ross then focused on several particular aspects of the audit as defi-

<sup>2</sup> Price Waterhouse conducted the statement audit in accordance with "SAS-62, the Statement of Auditing Standards 62 Special Reports," which was issued by the Accounting Principles Board, the senior technical body of the American Institute of Certified Public Accountants.

cient under generally accepted auditing standards. He criticized, for example, the sample size of paychecks evaluated by Price Waterhouse (24 to be exact) as "unacceptably small" for a \$26 million payroll. He also chastised Price Waterhouse for its failure to contact those 24 employees directly to determine what work they did (which could then be compared to the allocation of their time to project codes) and for the auditors' similar treatment of non-payroll disbursement. Out of 31,000 non-payroll disbursements, Price Waterhouse investigated 116—a number he claimed "too few" for an audit of this kind.

This is not to suggest that all of Ross' criticisms raise factual issues—for as we said, the allocation of expenses into germane and nongermane categories is not a matter that an accountant can "audit." An auditor can certainly verify that money claimed to be spent was actually expended on the particular activity claimed, but he need not—nor do we see how he could—evaluate and characterize the nature of the activity itself for purposes of applying the RLA. For that reason, we remand for the district court's consideration appellants' claim that the methodology failed to comply with generally accepted auditing principles.

The pilots' related attack on ALPA's recordkeeping of germane and nongermane expenditures, including its treatment of "overhead" expenses, is properly leveled not on the audit, but on ALPA's adequacy of proof. The "union bears the burden of proving the proportion of chargeable expenses to total expenses." *Lehnert*, 500 U.S. at 524. The pilots contend that "ALPA's method of tracking costs and determining which are germane and nongermane is not sufficiently reliable" to meet this burden. They also challenge ALPA's "germane" categorization of administrative expenses, which support all of the union's activities, such as rent, administrative salaries, equipment maintenance, and general supplies. The district court relied on the arbitrator's findings of fact and held that ALPA had

provided enough detail about its calculations to meet *Hudson's* requirements. In light of our holding above that the pilots were not required to exhaust arbitration, we reverse and remand for the district court to reach independent factual findings.

This, of course, raises the question of what records ALPA must provide to the pilots in discovery so that they may challenge ALPA's assertion that the expenses were properly charged. The pilots obviously need some minimal level of access, *see Bromley*, 82 F.3d at 696, but it is equally clear that *Hudson* did not ordain a sweeping inquiry into all of ALPA's receipts. *See Hudson*, 475 U.S. at 307 n.18. We leave discovery management to the district court, but some sort of sampling technique might well provide the appropriate balance between the non-members' interest in data that is accessible and informative and the union's concerns that the request be manageable. It is just as inadequate for the union to force nonmembers to plough through an entire warehouse of receipts without organizing the information in some fashion as it is for the union to supply nothing at all. It is the district court's responsibility to decide the appropriate middle ground between the two extremes.

[ Filed Aug. 30, 1995 ]

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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Civil Action No. 91-3161 (NHJ)

ROBERT A. MILLER, *et al.*,  
Plaintiffs,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, *et al.*,  
Defendants.

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MEMORANDUM OPINION

Plaintiffs, 153 nonunion pilots employed by Delta Air Lines, bring this action pursuant to the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151-188 (1988), to challenge the agency shop fees charged to them by the union, defendant Air Line Pilots Association ("ALPA"), for the year 1992. This matter is presently before the Court on the motion of ALPA for summary judgment on plaintiffs' seventh cause of action, the one remaining count in this case. Plaintiffs' seventh cause of action alleges that portions of the 1992 agency shop fees were used for purposes not germane to collective bargaining.

An arbitration was held in this matter in early 1994. In his Opinion & Award, the arbitrator found that the challengers were entitled to a reduction in the amount of agency shop fees they paid for 1992 because certain payments were not germane to collective bargaining. He determined that 158 nonunion pilots were proper parties to the arbitration and thus were entitled to the fee adjustment. Out of those 158 pilots, 91 intervened in the present lawsuit or, in the case of Robert A. Miller, Kenneth

Shakelford, and Robert V. Ziminsky, already were plaintiffs. Those 91 pilots seek a trial *de novo* on the proper calculation of expenses that are germane and nongermane to collective bargaining. The other parties to the arbitration, 67 nonunion pilots, have not challenged the arbitrator's award. In addition to the 91 pilots who were parties to the arbitration, 62 nonunion pilots who were *not* parties to the arbitration have intervened in this case, also seeking a trial on the proper calculation of the 1992 agency shop fees.

One of the main issues before the Court at this point in the litigation is the effect of the arbitration, a procedure mandated by the Supreme Court in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986), on the present lawsuit. Also before the Court is the question of whether the union can require nonunion members to submit to *Hudson*-type arbitration before bringing a suit in federal court. Upon consideration of ALPA's motion for summary judgment, the memoranda in support thereof and in opposition thereto, the entire record herein, including the record of the arbitration, and the oral argument of counsel at a hearing on this matter, the Court will defer to the findings of fact of the arbitrator unless those findings are clearly erroneous, and will review *de novo* the arbitrator's legal conclusions. Finding no errors with the decision and award of the arbitrator, the Court grants ALPA's motion for summary judgment.

# I.

ALPA's written "Policies and Procedures Applicable to Agency Fees" provide that, at the end of every year, ALPA must determine which expenditures are germane and which expenditures are not germane to collective bargaining, and report those expenditures in a "Statement of Germane and Nongermane Expenses" ("SGNE"). ALPA creates the SGNE by dividing its project codes into germane and nongermane categories, and then calculating

the amount spent on each code. ALPA's 1992 SGNE<sup>1</sup> includes six pages of notes to explain the expenditures and a 22-page "breakdown of germane and nongermane expenses by project." Arb. Ex. 11. The parties dispute the exact date that ALPA issued the 1992 SGNE, but it appears that ALPA issued the SGNE in mid-1993, at least a year after plaintiffs filed this lawsuit.

A number of pilots challenged the 1992 SGNE and requested arbitration under ALPA's policies and procedures. Included among the challengers were the four original nonunion plaintiffs in this case. On January 21, 1994, plaintiffs filed a motion in this Court for a preliminary injunction, seeking to enjoin the arbitration proceedings, which were scheduled to begin on January 24, 1994. The Court denied the motion. An arbitrator from the American Arbitration Association ("AAA") held three days of hearings in January, February, and March 1994, and issued his Opinion and Award on August 10, 1994. According to the arbitrator's opinion, 174 pilots initially

<sup>1</sup> The 1992 SGNE figures are:

## Germane expenses:

Negotiations	\$29,808,426	
Grievances	3,164,603	
Union administration	8,947,343	
General administration	13,639,425	
	<u>55,559,797</u>	<u>81.00%</u>

## Nongermane expenses:

Litigation	\$ 8,334,236	
Organization	1,160,688	
Charitable	122,966	
Insurance	663,352	
Legislative	903,247	
Publications	1,639,914	
AFL-CIO	211,128	
	<u>13,035,531</u>	<u>19.00%</u>

Total expenses:	<u>\$68,595,328</u>	<u>100.00%</u>
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requested arbitration of the agency fee. Thereafter, a number of challengers indicated that they wished to withdraw from the arbitration in order to join in the present litigation in federal court. Plaintiffs' counsel attended the arbitration and entered his "conditional" appearance for a number of pilots who had previously written letters of withdrawal. Plaintiffs' counsel, along with ALPA's counsel, was given a full opportunity to present oral and documentary evidence, to examine and cross-examine witnesses, and to file briefs or written comments.

Taking the expenses as claimed and audited, the arbitrator reviewed the allocation of germane and nongermane expenses in the 1992 SGNE. *See* Arb. Award at 18. The arbitrator determined that certain expenses that had been charged as germane actually were not germane. The arbitrator directed ALPA to recompute the agency fee charged to nonunion members by subtracting payments to International Federation of Air Line Pilots ("IFALPA") and International Transport Workers ("ITW"), expenses for Newsletter Services, and all expenses linked to the Department of Government Affairs. Aside from those categories, the arbitrator found that ALPA's computation of germane and nongermane expenses in its 1992 SGNE was supported by the evidence and applicable Court decisions, such as *Lehnert v. Ferris Faculty Assn.*, 500 U.S. 507 (1991); *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986); *Ellis v. Railway Clerks*, 466 U.S. 435 (1984); *Crawford v. Air Line Pilots Assn. Intl.*, 992 F.2d 1295 (4th Cir. 1993) (en banc); and *Pilots Against Illegal Dues v. Air Line Pilots Assn.*, 938 F.2d 1123 (10th Cir. 1991).

Specifically, the arbitrator rejected the challengers' claim that an expenditure may not be allowed as a germane expense without a detailed explanation of every claimed expenditure. The arbitrator found that ALPA had provided ample detail to justify its expenditures

through project listing and explanations of the nature of the expenditures. Moving on to the merits, the arbitrator found that all expenses related to the Major Contingency Fund ("MCF") for 1992 were germane and properly charged to non-member agency fee payers. Next, he found that ALPA's costs relating to air safety activities were germane expenses, especially in light of the Supreme Court's decision in *Lehnert*. The arbitrator found that rent charges, including utilities, were allocated to specific project codes which were then separated into germane and nongermane expenses, so those charges were appropriately classified. The arbitrator found that expenses such as salaries, other expenses of officers and employees, and costs of facilities and equipment were germane. Finally, the arbitrator rejected the argument of the Delta pilots that they should be charged only for those expenses that were related to the negotiation of the Delta contract and the cost of servicing that contract. The total amount of expenses reallocated from germane to nongermane was \$300,224, equal to .004% of the total of all expenses. *See* Supp. Arb. Opinion at 3.

## II.

At issue in the present case is to what extent, if any, the Court may defer to the factual findings of the arbitrator. Although the Supreme Court has held that the union is required to provide arbitration procedures in RLA agency shop disputes, it is not clear what effect an arbitration award has on subsequent or concurrent litigation. The RLA does not mention a duty of the union to provide arbitration or a duty of the nonunion challengers to exhaust arbitration before bringing a suit in federal court to challenge agency shop fees. The duty of the union to provide arbitration was created by the Supreme Court in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986), where the Supreme Court listed arbitration as a procedural safeguard that the union

must provide when subjecting nonmembers to agency shop fees. The exact language is that the union must "provide for a reasonably prompt decision by an impartial decisionmaker." *Id.* at 307. In the process of establishing a procedure for these types of cases to be resolved through arbitration, the *Hudson* Court noted that "[t]he arbitrator's decision would not receive preclusive effect in any subsequent [legal] action." *Hudson*, 475 U.S. at 308, n.21. It is thus clear that the arbitration does not have preclusive effect, but the Supreme Court has not given the district courts any guidance about how much they may defer to the arbitrator's findings. Justice White was the only justice in *Hudson* to comment on the issue, noting in his concurrence:

[A]s I understand the Court's opinion, the complaining nonmember need only complain; he need not exhaust internal union hearing procedures, if any, before going to arbitration. However, if the union provides for arbitration and complies with the other requirements specified in our opinion, it should be entitled to insist that the arbitration procedure be exhausted before resorting to the courts.

*Hudson*, 475 U.S. at 331.

After the Supreme Court's ruling in *Hudson*, the case eventually returned to the 7th Circuit Court of Appeals. *Hudson v. Chicago Teachers Union, Local No. 1*, 922 F.2d 1306, 1314 (7th Cir.), *cert. denied*, 501 U.S. 1230 (1991). In that later proceeding, the 7th Circuit discussed the arbitration process:

Requiring the federal courts to micromanage the fee calculation in every case challenging a union's fair share fee would place an overwhelming and unrealistic burden on the courts. . . . Were we to accept plaintiffs' invitation and provide a hearing and judicial determination of the correctness of the fee, we would in effect render redundant and irrelevant the

requirements that an impartial decisionmaker hear the dispute and that an escrow account be provided for the amounts reasonably in dispute while the challenge is pending. The proper procedure employs each of the three prerequisites identified by the Supreme Court: the fair share notice provides the basis for a challenge to the fair share fee assessment; the impartial decisionmaker determines the correctness of the fee amount; and the escrow protects the challenger's funds pending such a decision. . . . Of course, the impartial decisionmaker's determination is not the final word on the challenge. If the decision is adverse to the plaintiffs, they may *subsequently* seek review by a federal court.

*Id.* at 1314.

The Court of Appeals for this Circuit has noted the exhaustion issue without deciding it in two recent cases, *Beckett v. Air Line Pilots Assn.*, 995 F.2d 280, 285 (D.C. Cir. 1993) and *Beckett v. Air Line Pilots Assn.*, No. 94-7130, 1995 U.S. App. Lexis 17476 (D.C. Cir., July 18, 1995). In the first *Beckett* case, the Court of Appeals noted that this issue has created a circuit split:

We begin by noting the theories in this case that we need *not* reach. . . . [W]e would have to decide whether appellants must arbitrate this issue [whether the RLA prohibits ALPA from requiring non-union pilots to help pay for a union strike in another bargaining unit] before filing suit. There is a split in the circuits on this question. Compare *Hudson v. Chicago Teachers Union, Local No. 1*, 922 F.2d 1306, 1314 (7th Cir.) (holding that non-union members must arbitrate disputes over calculation of agency shop fee), *cert. denied*, — U.S. —, 111 S. Ct. 2852, 115 L.Ed.2d 1020 (1991), with *Tierney v. City of Toledo*, 917 F.2d 927, 940 (6th Cir. 1990) (requiring union to remove exhaustion requirement

from its arbitration procedures for contesting calculation of agency shop fee).

*Beckett I*, 995 F.2d at 284-85. In the second *Beckett* case, ALPA again raised the exhaustion issue. The Court of Appeals noted in a footnote:

ALPA similarly contends the pilots should have exhausted their contractual remedy of arbitration before challenging the assessments in court. *See* App. 67-70. While this position may have merit, to remand for arbitration at this late stage would only yield futile swink. *See Pilots Against Illegal Dues v. ALPA*, 938 F.2d 1123, 1133 (10th Cir. 1991) (concluding "[i]t would be redundant at this point . . . to order the matter to be submitted to an arbitrator.").

*Beckett II*, slip op. at 5.

Only one case is clearly on point with respect to the exhaustion issue, *Bromley v. Michigan Education Association-NEA*, 843 F. Supp. 1147 (E.D. Mich. 1994), appeal pending, Nos. 94-1164, 94-1210 (6th Cir.). In *Bromley*, as in the present case, a *Hudson*-type arbitration was held and an Arbitration Opinion and Award issued before the issues at the federal district court became ripe for disposition. The *Bromley* plaintiffs argued that the determinations of the arbitrator could be "virtually ignored," while the defendants maintained that the trial court could and should defer to the factual findings of the arbitrator. After considering the arguments of the parties, the court held, "[u]nless the arbitration award is to have a significant impact in subsequent judicial proceedings, the procedure spawned by the Supreme Court is largely a waste of time and money. . . . [I]t is the opinion of the Court that it is desirable and consistent with developing case law to give as much deference to

the arbitration award as is consistent with the mandate of § 1983."<sup>2</sup> *Bromley*, 843 F. Supp. at 1153-54.

ALPA claims that an exhaustion requirement is implicit in the *Hudson* decision, meaning that those 62 plaintiffs who failed to bring their claims to arbitration should be barred from litigation or, alternatively, bound by the arbitrator's decision.<sup>3</sup> ALPA asks the Court to take the role of reviewing the decision of the arbitrator, and not to hold a trial *de novo*. ALPA recommends that the Court use the "clearly erroneous" standard of review for the arbitrator's fact-finding, and review *de novo* the arbitrator's rulings on the law.

Plaintiffs, however, claim that the union has no power under the RLA to require nonmembers to exhaust arbitration remedies. Plaintiffs argue that the Court cannot review or defer to the arbitrator's decision, but must hold a trial *de novo*. The nonunion members note that they never agreed by contract to be bound by a duty to arbitrate. The Court is aware of the principle that parties can be forced to arbitrate a grievance only if they have entered into a contract requiring that sort of dispute resolution. *See AT&T Technologies, Inc. v. Communication Workers*, 475 U.S. 643, 649 (1986); *Gateway Coal Co. v. United Mine Workers of America*, 414 U.S. 368, 374 (1974). In the present case, the nonunion plaintiffs did not have a contractual relationship with ALPA because they were not members of the union. Moreover, ALPA's agency shop rules—which mandate certain procedures that ALPA nonmembers must follow—use the permissive "may" instead of the mandatory "shall" when describing the pilots' duty to arbitrate.

<sup>2</sup> The plaintiffs in *Bromley*, like *Hudson*, were public school teachers, so the case was brought under 42 U.S.C. § 1983 (1988).

<sup>3</sup> ALPA acknowledges that if those 62 plaintiffs are not foreclosed from bringing their claims before this court, they would be entitled to receive the fee adjustments ordered by the arbitrator.

Yet it is not unprecedented for courts to require exhaustion of arbitration remedies as a matter of judicial discretion. For example, although the Employee Retirement Income Security Act ("ERISA") itself does not require the exhaustion of remedies available under pension plans, courts have required exhaustion as a matter of judicial discretion. See *Communications Workers of America v. AT&T*, 40 F.3d 426, 431-32 (D.C. Cir. 1994). As support for this judicially created requirement, the Court of Appeals for the D.C. Circuit cited factors such as preventing premature judicial interference with a pension plan's decision-making, and the prospect that the exhaustion requirement may render subsequent judicial review unnecessary because claims may be resolved by the earlier proceeding. *Id.* at 432.

The Court deems the exhaustion issue in the present case to be much like the issue in *Communications Workers* in that, although the RLA itself does not require the exhaustion of arbitration remedies and there is no contractual relationship between the parties, the Court must consider objectives such as preventing premature judicial intervention and giving relevance to the arbitral proceedings that were mandated by the Supreme Court in *Hudson*. The Court concludes that the procedures established in *Hudson* by which nonunion members may challenge agency shop fees require, in the words of Justice White, that "if the union provides for arbitration . . . it should be entitled to insist that the arbitration procedure be exhausted before [the challengers may] resort[] to the courts." *Hudson*, 475 U.S. at 331.

The Court rejects plaintiffs' argument that the language in *Hudson*, "[t]he arbitrator's decision would not receive preclusive effect in any subsequent . . . litigation," prevents the Court from reviewing the decision of the arbitrator and mandates that the Court hold a *de novo* trial on the same issues covered in the arbitration. Plaintiffs cite *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 55-

56 (1974), in support of their position. *Alexander*, however, was a Title VII employment discrimination case, not a labor dispute. In that case, the Court concluded that an employee could pursue a discrimination claim in both arbitral and judicial forums because "the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective-bargaining agreement and his cause of action under Title VII. The federal court should consider the employee's claim *de novo*." *Id.* at 59-60. Title VII litigation differs dramatically from the present RLA case, however. Because the Supreme Court itself has established the arbitration procedure in RLA cases, the Court determines that the principles set forth in *Alexander v. Gardner-Denver Co.* for Title VII suits do not apply to the present situation. The federal courts reviewing Title VII administrative proceedings before the *Alexander* decision did not have a Supreme Court mandate of arbitration. The Court agrees with ALPA that it would be pointless and unreasonable for the Supreme Court to require unions to establish arbitration procedures and then permit employees to ignore those procedures and bring their claims directly to federal court.

The Court will adopt ALPA's suggestion that it review the fact-finding of the arbitrator according to the "clearly erroneous" standard, the standard by which district courts review the findings of masters. See Fed. R. Civ. P. 53(e)(2). The Court will review *de novo* all legal issues. The Court concludes that the requirement of exhaustion of arbitral remedies and the standard of review set forth above give effect to the procedures established by the Supreme Court in *Hudson* and prevent the situation whereby unions subject to the RLA would have to defend their agency shop fee calculations in two separate trials

every year—both in an arbitration proceeding and in a lawsuit brought by nonmembers who elect not to participate in the arbitration.

As mentioned above, 62 of the plaintiffs were not parties to the arbitration. Those plaintiffs have made no showing that the arbitration would have been any different if they had been present. ALPA has agreed to give them the same rebate that was given to the 158 pilots who did arbitrate. In concluding that the scheme set forth in *Hudson* allows the union to require challengers to the agency shop fee to arbitrate the dispute before bringing a claim in federal court, the Court applies the decision of the arbitrator to those pilots.<sup>4</sup>

### III.

Plaintiffs allege that ALPA did not properly calculate its germane and nongermane expenses in its 1992 Statement of Germane and Nongermane Expenses ("SGNE"). Plaintiffs do not dispute the following characterization of their arguments in this cause of action:

1. That ALPA's method of tracking costs and determining which are germane and nongermane is not sufficiently reliable to satisfy its burden of proof;
2. That ALPA is required to, but did not, determine germane costs on an airline-by-airline basis;
3. That ALPA is required to, but did not, treat as nongermane all unspent money in its Major Contingency Fund ("MCF");

<sup>4</sup> If anything, the Court is granting certain of those pilots more relief than they reasonably could expect—the record shows that some of those pilots were not parties to the arbitration because they failed to file an objection with the union within the allotted time period. After failing to file an objection with the union, thus barring their attendance at arbitration, those pilots intervened in the present lawsuit.

4. That ALPA has not properly allocated "indirect" or "overhead" costs;
5. That ALPA should have treated all costs related to air safety activities as nongermane to collective bargaining.

See ALPA's Mem. in Supp. Mot. Summ. J. at 21; Pls.' Oppn. to ALPA's Mot. Summ. J. at 29. The burden of proof is on ALPA to prove that its calculation of germane/nongermane expenses is proper. "Since the unions possess the facts and records from which the proportion of political to total union expenditures can reasonably be calculated, basic considerations of fairness compel that they, not the individual employees, bear the burden of proving such proportion." *Aboud v. Detroit Board of Education*, 431 U.S. 209, 239-40, n.40 (1977), quoting *Railway Clerks v. Allen*, 373 U.S. 113, 122 (1963).

The Court will address each of the plaintiffs' arguments in turn:

1. Plaintiffs allege that ALPA's method of tracking costs and determining which are germane and nongermane is not sufficiently reliable to satisfy its burden of proof. The arbitrator concluded, after a review of the evidence submitted by both sides, that the SGNE "does contain sufficient information to permit an intelligent appraisal of the nature of the expenses and the project for which they were expended." Arb. Award at 15. The arbitrator examined the way in which ALPA tracks its expenses, which is by allocating each expense to a particular project code. ALPA's system has over 1,200 such project codes. See Arb. Award at 10. The arbitrator found that "[t]he expenses are charged both to a natural cost category and to a project code, per the testimony and report of the auditing firm. Employee wages and benefit costs are allocated to specific projects based on time records.

Rental records allocate cost to the project based on square footage used." Arb. Award at 10. The projects are allocated as germane or nongermane based on the nature of the project, which is determined by a review of the project function by ALPA's Legal Department and the Director of Finance. The project system has existed since 1986. The audit statement, reviewed and quoted at length in the arbitrator's opinion, further discussed the methodology by which ALPA categorizes its expenses as germane or nongermane. *See* Arb. Award at 11-14. The arbitrator concluded:

The items are sufficiently identified so that at the hearing the arbitrator and the Challenger's counsel were able to make appropriate inquiry regarding the nature of the expense. . . . The SGNE contains detailed project expenditures under broad categories of negotiations, grievances, general administration, union administration, litigation, legislation, publications, organizing, insurance, charity and per capita payments. It permits questions regarding safety items that are identified; it permits inquiry regarding expenditure on TWA-Icahn expenditures; and various categorized office expenses. Based on all of the above, we find that the SGNE meets all the criteria as a report of expenses categorized as germane and nongermane.

Arb. Award at 15-16. The Supreme Court in *Hudson* held that the union is required to provide nonmembers with adequate information about the basis for the proportionate share, *see Hudson*, 475 U.S. at 306, but also noted:

We continue to recognize that there are practical reasons why "[a]bsolute precision" in the calculation of the charge to nonmembers cannot be "expected or required." [citations omitted]. Thus, for instance, the Union cannot be faulted for calculating its fee

on the basis of its expenses during the preceding year. The Union need not provide nonmembers with an exhaustive and detailed list of all its expenditures, but adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor.

*Hudson*, 475 U.S. at 292 n.18. The Court determines, upon review of the record, that the arbitrator made no clearly erroneous findings of fact with respect to this issue, and concludes as a matter of law that ALPA provided enough detail about its calculation of germane and nongermane expenditures to satisfy the requirements of *Hudson*.

2. Plaintiffs allege that ALPA is required to, but did not, determine germane costs on an airline-by-airline basis. This argument merits little discussion because the decision of the Supreme Court in *Lehnert v. Ferris Faculty Assn.*, 500 U.S. 507, 519-24 (1991), as well as the decisions of two Courts of Appeals, *Crawford v. Air Line Pilots Assn.*, 922 F.2d 1295 (4th Cir.), *cert. denied*, 114 S. Ct. 3249 (1993); *Pilots Against Illegal Dues v. Air Line Pilots Assn.*, 938 F.2d 1123 (10th Cir. 1991), mandates that the argument must fail. The Supreme Court rejected a similar argument in *Lehnert*, stating, "[w]e therefore conclude that a local bargaining representative may charge objecting employees for their pro rata share of the costs associated with otherwise chargeable activities of its state and national affiliates, even if those activities were not performed for the direct benefit of the objecting employees' bargaining unit." ALPA has carried its burden of proving the proportion of chargeable expenses because, as the arbitrator stated, "we find that ALPA[ ] operates as a unified Union where each contract has some affect on all carriers, albeit not a direct measurable impact, and that therefor[ ] no basis exists for establishing a unit by unit system of charges." Arb. Award at 38. The Court determines, upon review

of the record, that the arbitrator made no clearly erroneous findings of fact with respect to this issue, and concludes as a matter of law that ALPA need not determine germane costs on an airline-by-airline basis.

3. Plaintiffs allege that ALPA is required to, but did not, treat as nongermane all unspent money in its Major Contingency Fund ("MCF"). ALPA maintains the MCF for the purpose of having the ability to support a strike affecting one or more carriers which employ its members. See Arb. Award at 19. ALPA raises money for the fund by collecting from members and nonmembers a percentage of their wages as a contribution. According to ALPA's constitution, the payments to the MCF should be suspended when the fund reaches \$50 million. Plaintiffs allege that ALPA has been using surplus MCF funds as a "loan" to the union, spending that money on general expenses in violation of the union's constitution. Citing *Crawford v. Air Line Pilots Association*, 992 F.2d 1295 (4th Cir. 1993), the arbitrator rejected the challengers' argument that the MCF was not chargeable to nonunion members. Addressing the same facts as in the present case, the Fourth Circuit held:

Accordingly, applying the test enunciated by the Court in *Lehnert*, we hold that a pro rata share of strike support benefits for pilots in other bargaining units and of the pro rata cost of the major contingency fund may be charged to objecting agency-fee payers. *Accord Pilots Against Illegal Dues v. Airline Pilots Ass'n.*, 938 F.2d 1123, 1131 (10th Cir. 1991).

*Crawford*, 992 F.2d at 1301. The Court agrees that *Crawford* is dispositive of the issue of the right of ALPA to charge nonunion members for the maintenance of the MCF, and, accordingly, rejects plaintiffs' argument with respect to this issue.

4. Plaintiffs allege that ALPA has not properly allocated "indirect" or "overhead" costs. ALPA treats such

"indirect" or "overhead" costs the same as any other cost—they are allocated by project; the projects are separated into germane and nongermane expenses. Arb. Award at 36. The Court concludes as a matter of law that ALPA has met its burden of proving that such costs have been properly allocated as germane or nongermane expenses according to the standards set forth in *Lehnert* that "chargeable activities must (1) be 'germane' to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." *Lehnert*, 500 U.S. at 519. Aside from the expenses that the arbitrator reallocated, see Arb. Award at 39, the arbitrator found that the "indirect" or "overhead" expenses that were charged to the nonunion members were germane to collective bargaining. The Court concludes that the arbitrator made no clearly erroneous findings of fact with respect to this issue, and that ALPA's allocation of "indirect" or "overhead" costs satisfies the standards set forth by the Supreme Court.

5. Plaintiffs allege that ALPA should have treated all costs related to air safety activities as nongermane to collective bargaining. Their main argument with respect to air safety is that, because ALPA's safety activities involve contacts with the FAA and other government entities, charging nonmembers for such activities is impermissible. After a lengthy review of the facts and the law related to this issue, the arbitrator concluded that ALPA's "expenditures for safety committees and safety activities involving various problems faced by the pilot[s] represented by ALPA, are properly charged as a germane expense." Arb. Award at 33; see *id.* at 23-33. The arbitrator examined ALPA's "Air Safety Manual" and considered the testimony of ALPA's Assistant Director in the Representation Department, who has been involved in the administration of collective bargaining agreements. The record shows that ALPA's role in air safety includes accident in-

vestigation, the representation of pilots in grievances before the FAA, involvement in local and regional air safety committees, and other activities designed to promote safety. The arbitrator found that:

There is no doubt that the Union's investigation of accidents serves a public good, even if it supplements the Federal government's official investigation. There is no question that committees considering air traffic control procedures, aircraft airworthiness, airport standards, all weather flying, hazardous materials, CHIPS [Charting and Instrument Procedures], human performance, aviation weather and ground deicing, among others, which may supplement Federal regulatory studies and efforts and carrier studies and efforts, are most beneficial to the pilots represented by the Union, as well as all of the public. The Union's role in establishing local, regional, and national air safety groups and in providing a system for pilots to report safety problems, is most desirable as a function of a professional organization and for the public, in general.

Arb. Award at 25. ALPA's collective bargaining agreement with the Delta pilots includes safety-related provisions.

Because the air safety costs are not directly related to ALPA's representational duties, the Court must apply the standards set forth in *Lehnert* to determine if those costs are properly chargeable to the union nonmembers. The Court concludes as a matter of law that ALPA has met its burden of proving that the air safety costs have been properly allocated as germane expenses. Such expenditures are germane to collective-bargaining activity because they are a subject of the collective bargaining agreement. Safety expenditures are justified by the government's vital policy interest in labor peace and avoiding 'free riders.' Finally, safety expenditures do not significantly add to the burdening of free speech. *See*

*Lehnert*, 500 U.S. at 519. The air safety expenditures are not being used for a political purpose simply because ALPA has some dealings with the federal government. The Court can find no constitutional grounds by which a nonmember could object to being charged for safety costs.

Having addressed plaintiffs' arguments that ALPA did not properly calculate its germane and nongermane expenses in its 1992 SGNE, having reviewed the record and determined that the arbitrator made no clearly erroneous findings of fact, and having reviewed all legal issues *de novo*, the Court concludes that ALPA is entitled to judgment as a matter of law. ALPA's motion for summary judgment will be granted. An appropriate Order will issue.

/s/ Norma Holloway Johnson  
NORMA HOLLOWAY JOHNSON  
United States District Judge

Dated: August 30, 1995

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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Civil Action No. 91-3161 (NHJ)

ROBERT A. MILLER, *et al.*,  
Plaintiffs,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, *et al.*,  
Defendants.

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ORDER

Before the Court is the motion of defendant Air Line Pilots Association ("ALPA") for summary judgment on plaintiffs' seventh cause of action, the one remaining count in this case, alleging that portions of the 1992 agency shop fees were used for purposes not germane to collective bargaining. The Court has considered the motion, the memoranda in support of and in opposition to the motion, the oral argument of counsel at a hearing on this matter, and the entire record herein. Having reviewed all legal issues *de novo* and having determined that the arbitrator made no clearly erroneous findings of fact, it is this 30th day of August, 1995,

ORDERED that the motion of ALPA for summary judgment be, and hereby is, granted.

/s/ Norma Holloway Johnson  
NORMA HOLLOWAY JOHNSON  
United States District Judge

[Filed Jan. 24, 1996]

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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Civil Action No. 91-3161 (NHJ)

ROBERT A. MILLER, *et al.*,  
Plaintiffs,

v.

AIR LINE PILOTS ASSOCIATION, *et al.*,  
Defendants.

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ORDER

Before the Court is the motion of plaintiffs, pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, to alter or amend the Judgment in this action. Plaintiffs move the Court to amend the Memorandum Opinions and Orders filed January 24, 1994, April 28, 1995, and August 30, 1995. By those Orders, the Court denied an injunction requested by plaintiffs and entered summary judgment in favor of defendant, Air Line Pilots Association ("ALPA").

A Rule 59(e) motion to reconsider is not a vehicle for raising facts and theories upon which a court has already ruled. Such a motion "must address new evidence or errors of law or fact and cannot merely reargue previous factual and legal assertions." *Assassination Archives and Research Center v. United States Dept. of Justice*, 828 F. Supp. 100, 102 (D.D.C. 1993) (quoting *Mississippi Assn. of Coops. v. Farmers' Home Admin.*, 139 F.R.D. 542, 546 (D.D.C. 1991)). Only if the moving party presents new facts or a clear error of law which "compel" a change in the court's ruling will the motion to recon-

sider be granted. *State of New York v. United States*, 880 F. Supp. 37, 39 (D.D.C. 1995).

As the basis for their motion, plaintiffs erroneously assert that, at the time of its final Opinion and Order, the Court was unaware of the decision of the Court of Appeals for this Circuit in *Abrams v. Communications Workers*, 59 F.3d 1373 (D.C. Cir. 1995). Plaintiffs also erroneously assert that *Beckett v. ALPA*, 59 F.3d 1276 (D.C. Cir. 1995), constitutes an intervening change of the controlling law.

The decision in *Beckett* was issued on July 18, 1995. On July 19, 1995, the Court invited the parties to file supplemental briefs discussing the impact of *Beckett* on the present case. The decision in *Abrams* was issued on July 21, 1995. The Court was well aware of that decision and carefully considered the impact of *Abrams* on the present case. In its supplemental brief filed July 28, 1995, defendant ALPA discussed the impact of *Abrams* on the present case. The Court agreed with ALPA's conclusion that the decision in *Abrams* was not relevant to the issues before this Court, and thus did not mention *Abrams* in the August 30, 1995, Opinion. In plaintiffs' present motion, plaintiffs' counsel claims that he was unaware of the *Abrams* decision until after August 30, 1995. ALPA responds that *Abrams* was discussed in ALPA's supplemental brief filed July 28, 1995, so counsel should have been aware of it. Plaintiffs' counsel replies that he "had no further briefing opportunity prior to the decision in this case" in which to discuss *Abrams*. The record indicates, however, that plaintiffs' counsel had an opportunity to discuss *Abrams* in the supplemental brief he filed on July 28, 1995, seven days after the *Abrams* decision was issued and one month before the Court's final Opinion and Order of August 30, 1995. The record further shows that plaintiffs' counsel failed to request an opportunity to respond to ALPA's discussion of *Abrams*. At that point in the litigation, the Court,

recognizing the complexity of the motion for summary judgment, had already issued one lengthy Memorandum Opinion, twice requested supplemental briefing on the issues raised in the motion, and had heard the oral argument of counsel for both sides. Plaintiffs' counsel clearly could have requested at any time throughout the month of August that the Court consider his interpretation of a recent appellate decision.

Neither *Abrams* nor *Beckett* constitutes an intervening change in controlling law. As plaintiffs have presented no clear error of law to correct and no "manifest injustice" to prevent by granting the motion to reconsider, see *Natural Resources Defense Council, Inc. v. United States Environmental Protection Agency*, 705 F. Supp. 698, 702 (D.D.C. 1989), it is this 24th day of January, 1996,

ORDERED that plaintiffs' motion, brought pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, be, and hereby is, denied.

/s/ Norma Holloway Johnson  
NORMA HOLLOWAY JOHNSON  
United States District Judge

[Filed Apr. 28, 1995]

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 91-3161 (NHJ)

ROBERT A. MILLER, *et al.*,  
v. *Plaintiffs,*

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, *et al.*,  
*Defendants.*

## MEMORANDUM OPINION

Plaintiffs, 154 nonunion pilots and one union pilot employed by defendant Delta Air Lines ("Delta"), brought this action to challenge an "agency shop" agreement entered into by Delta and defendant Air Line Pilots Association ("ALPA") on November 1, 1991. ALPA, a labor organization, is the exclusive collective bargaining representative of the pilots employed by Delta and numerous other airlines. Currently pending before the Court is the motion of ALPA for summary judgment. Upon consideration of the motion of ALPA, the supporting and opposing memoranda, the entire record herein, including the record of the arbitration and the arbitrator's Opinion and Award, and for the reasons outlined below, the Court will grant ALPA's motion for summary judgment in part and order further briefing on the issue of the impact of the arbitration on the issues in plaintiffs' seventh cause of action.

ALPA has represented Delta pilots for several decades. In 1972, ALPA and Delta entered into an agency shop agreement, which was rescinded in 1973 through a "secret ballot" of Delta union pilots. Delta did not enter into another agency shop agreement until November 1, 1991; at that time, Delta and ALPA negotiated the "contract maintenance" agreement (hereinafter "Supplemental

Agreement") that is at issue in this case. Section 27 of the Supplemental Agreement, the agency shop provision, requires all pilots who do not choose to become or remain members of ALPA to pay a "service charge" to ALPA.<sup>1</sup>

In December 1991, four nonunion pilots and one union pilot filed this lawsuit, seeking declaratory and injunctive relief to prevent implementation of the Supplemental Agreement. The Court ruled on cross-motions for summary judgment on August 2, 1993, granting summary judgment for ALPA on four counts of the complaint and denying summary judgment without prejudice as to the three remaining counts. The Court also granted plaintiffs' motion to amend the complaint and reopen discovery. The Court subsequently denied plaintiffs' motion for class certification but allowed 151 nonunion Delta pilots to intervene in the litigation.

At this stage in the litigation, five claims under the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151-188 (1989) remain:

1. First & Third Causes of Action (Lack of Authority to Enter into Agreement, Denial of Future Voting Rights):

<sup>1</sup> Section 27 provides:

1. Each pilot of the Company covered by this Agreement who fails to voluntarily acquire and maintain membership in the Association, shall be required, as a condition of continued employment, beginning sixty (60) days after the effective date of this Agreement or the completion of his probationary period, whichever is later, to pay to the Association each month a service charge as a contribution for the administration of this Agreement and the representation of such employee. The service charge shall be an amount equal to the Association's regular and usual dues and including MEC assessments. In calculation of each non-member's monthly obligation, the Association shall allocate and adjust charges in the same manner as if followed with respect to its members.

Supplemental Agreement § 27, Ex. 1 to Pls.' Compl.

Plaintiffs allege that Delta and ALPA entered into a secret oral agreement to prevent a campaign in opposition to a union vote on the issue of whether to maintain the agency shop provision; they further allege that the secret agreement was not disclosed to the Master Executive Counsel ("MEC") as required under the Union Constitution and that the secret agreement denied Delta pilots future voting rights. Amendment to Complaint at VI, VII;

2. Fourth Cause of Action (Impermissible Collection of Moneys for Non-Germane Expenses):

Plaintiffs allege that the Supplemental Agreement does not expressly provide for a reduction or partial rebate of service fees to nonmembers who object to paying for union activities that are not germane to collective bargaining. Complaint at VIII;

3. Sixth Cause of Action (Illegal Grievance Procedure):

Plaintiffs allege that the grievance procedure established in the Supplemental Agreement does not provide a mechanism for challenging the collection of amounts used for purposes not germane to collective bargaining. Complaint at X;

4. Seventh Cause of Action (Non-Germane Expenditures):

Plaintiffs allege that ALPA failed to conduct an "independent audit" of ALPA's annual allocation of its expenditures as germane or nongermane to collective bargaining. Amendment to Complaint at XI; and

5. Seventh Cause of Action (Non-Germane Expenditures):

Plaintiffs allege that portions of fees paid by non-member pilots in 1992 under the Supplemental Agreement were used for purposes not germane to collective bargaining. Complaint at XI.

## II.

Labor-management relations in the airline industry are governed by the RLA, 45 U.S.C. §§ 151-188 (1988). In 1951, Congress amended the RLA to permit employers and unions to execute "agency shop agreements," which would require union-represented employees who chose not to be union members to contribute financially to the union for its collective bargaining activities on their behalf. *See* 45 U.S.C. § 152, Eleventh. The purpose of the amendment, which ended a long-standing RLA ban on union security agreements, was to eliminate the "free-rider" problem caused by union nonmembers benefitting from the collective bargaining activities of the union. *See International Assn. of Machinists v. Street*, 367 U.S. 740 (1961). Out of concern for the free speech rights of dissenting employees, the Supreme Court has interpreted § 152, Eleventh to include a limitation on the union's power to use agency shop fees: the union cannot collect from dissenting employees any money for the support of "ideological causes not germane to its duties as collective bargaining agent." *Ellis v. Railway Clerks*, 466 U.S. 435, 447 (1984). In *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986), the Supreme Court established procedures for a union to follow when collecting agency shop fees in order to avoid the Constitutional concerns expressed in its prior cases.<sup>2</sup> The Court stated:

<sup>2</sup> Although *Hudson* dealt with a public employer and public employees, it is generally recognized that the *Hudson* requirements apply to the airline industry's collective bargaining agreements. *See Crawford v. Air Line Pilots Assn. Intl.*, 992 F.2d 1295, 1301 (4th Cir. 1993) (citing *Railway Employees Dept. v. Hanson*, 351 U.S. 225, 232 (1956)).

We hold today that the constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending.

*Hudson*, 475 U.S. at 310. Most recently, the Supreme Court again addressed agency shop fees in *Lehnert v. Ferris Faculty Assn.*, 500 U.S. 507 (1991), ruling on what guidelines are to be followed in making the germane/nongermane determination.

### III.

Under Rule 56, summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, and admissions on file show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Material facts are those "that might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986). In considering a motion for summary judgment, the "evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson*, 477 U.S. at 255; see also *Washington Post Co. v. United States Dept. of Health and Human Servs.*, 865 F.2d 320, 325 (D.C. Cir. 1989). Rule 56 requires the nonmoving party to go beyond the pleadings and by its own affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). The non-moving party's opposition must consist of more than mere unsupported allegations or denials and must be supported by affidavits, depositions or other competent evidence setting forth specific facts showing that

there is a genuine issue of material fact in dispute. Fed. R. Civ. P. 56(e). The non-moving party is required to provide evidence that would permit a reasonable factfinder to find in its favor. *Laningham v. United States Navy*, 813 F.2d 1236, 1242 (D.C. Cir. 1987). If the evidence is "merely colorable" or "not significantly probative," summary judgment may be granted. *Anderson*, 477 U.S. at 249-50.

1. First & Third Causes of Action (Lack of Authority to Enter into Agreement, Denial of Future Voting Rights):

Plaintiffs allege that ALPA and Delta entered into a secret oral agreement that Delta would not allow any campaign in opposition to the agency shop when the union members voted on whether to continue the agency shop. In support of their argument, plaintiffs quote the deposition testimony of Captain Robert D. Shelton, who was the chairman of ALPA's Master Executive Council at Delta at the time the Supplemental Agreement was negotiated.<sup>3</sup> The deposition clearly shows, however, that the oral agreement in question was that *Delta itself* would not engage in or sponsor a campaign in opposition to the agency shop prior to the election. On the next page of the deposition transcript, Shelton explains that the oral agreement was that Delta would not "aid and abet" the anti-agency shop, anti-ALPA campaign. Shelton Dep. at 56. According to the declaration of H.C. Alger, Delta's Senior Vice President for Operations, the agreement was that Delta

<sup>3</sup> A: As part of the condition of vote, it was agreed that the corporation would not conduct nor allow to be conducted on the property an anti-campaign against us for the vote. In other words, we [ALPA] would take care of that ourselves.

\* \* \* \*

The corporation would not mount a campaign against that provision nor allow that to occur within the methods they have of controlling that.

Shelton Dep. at 54-55.

would remain neutral.<sup>4</sup> See Alger Decl., Ex. A to Delta's Response to Pls.' Mot. Sum. J. (Filed Aug. 20, 1992). Plaintiffs have presented no evidence showing that there is any issue here for trial. They have not contradicted the declaration of H.C. Alger; they have no other statement by Shelton other than an unclear statement from his deposition which he himself explains on the next page. Even granting plaintiffs every inference, the Court concludes that no reasonable finder of fact could conclude from this record that the alleged "secret agreement" existed. The Court grants defendants summary judgment on this cause of action.

2. Fourth Cause of Action (Impermissible Collection of Moneys for Non-Germane Expenses):

Plaintiffs next allege that the Supplemental Agreement is unlawful on its face because it does not expressly provide for a reduction or partial rebate of service fees to nonmembers who object to paying for nongermane union activities. ALPA acknowledges that *Hudson* and its predecessors prohibit the union from charging objectors for nongermane activities, but argues that this rule need not be incorporated into the agency shop agreement itself. The rights that plaintiffs are claiming are protected by ALPA's "Policies and Procedures Applicable to Agency Fees."<sup>5</sup> Arb. Ex. 10. Plaintiffs have raised no factual disputes with respect to this cause of action; the dispute

<sup>4</sup> Alger states, "With respect to such vote, I agreed with Captain Shelton that Delta would remain neutral—i.e., Delta would not advocate either the retention or the rejection of the contract maintenance fee provision. I did not agree that Delta would not allow a campaign against retention of the contract maintenance fee provision to occur on Delta property." Alger Decl. at ¶ 2.

<sup>5</sup> The "Policies and Procedures" state, in part:

1. Nonmembers who are required to contract to pay an agency fee to ALPA as a condition of their employment may object to the use of their fees for purposes that are not germane to collective bargaining.

Arb. Ex. 10.

is simply whether the rights they assert and that established case law guarantees must be written on the face of the collective bargaining agreement. Because neither the RLA nor any court decision requires that such rights be incorporated into the language of the agreement rather than in a statement of policies and procedures, the Court grants the motion of ALPA for summary judgment on this issue.

3. Sixth Cause of Action (Illegal Grievance Procedure):

In plaintiffs' next cause of action, they allege that the grievance procedure established in the Supplemental Agreement does not provide a mechanism for challenging the collection of amounts used for nongermane purposes. ALPA argues, and plaintiffs do not dispute, that these mechanisms are set forth in ALPA's "Policies and Procedures Applicable to Agency Fees." Arb. Ex. 10. ALPA does not dispute that *Hudson* and its predecessors mandate a procedure by which objectors may challenge the agency fee. Plaintiffs ask this Court to be the first court ever to hold that agency shop procedure must be part of the agency shop agreement. See Pls.' Oppn. to ALPA's Mot. Summ. J. at 23. The Court finds no authority to do so, and accordingly grants the motion of ALPA for summary judgment on this issue.

4. Seventh Cause of Action (Non-Germane Expenditures):

Plaintiffs claim that ALPA's 1992 SGNE was not audited as required by *Hudson*. Plaintiffs complain that ALPA does not audit the "germane/non-germane calculation" and that ALPA does not "examine annually its expenditures in each project code." Amendment to Compl. at ¶¶ 86A-86L. These allegations must fail because the 1992 SGNE was, in fact, audited by Price Waterhouse. The "Report of Independent Auditors," which is attached to the 1992 SGNE begins: "We have audited the accom-

panying statement of germane and nongermane expenses of Air Line Pilots Association for the year ended December 31, 1992." See 1992 SGNE. Plaintiffs are dissatisfied with the scope of the review, but the audit apparently satisfies the *Hudson* requirement. Nothing in *Hudson* requires the type of audit that plaintiffs seek; in fact, the only guidance on this issue given by the Supreme Court in *Hudson* is that:

We continue to recognize that there are practical reasons why '[a]bsolute precision' in the calculation of the charge to nonmembers cannot be 'expected or required.' . . . The Union need not provide nonmembers with an exhaustive and detailed list of all its expenditures, but adequate disclosures surely would include the major categories of expenses, as well as verification by an independent auditor.

*Hudson*, 475 U.S. at 307, n.18. In *Dashiell v. Montgomery County*, 925 F.2d 750 (4th Cir. 1991), the Fourth Circuit addressed this issue, concluding: "We have found no circuit decision which supports the contention that an independent auditor is required to make the legal determination as to that which is chargeable [to nonunion employees] and that which is not in order to satisfy the requirements of *Hudson*." *Id.* at 755. The only purpose of the audit requirement is "to ensure that the expenditures which the union claims it made for certain expenses were actually made for those expenses." *Andrews v. Education Assn.*, 829 F.2d 335, 340 (2d Cir. 1987). As plaintiffs apparently concede, the Price Waterhouse review accomplishes this purpose by providing the assurance that the sums allocated to project codes are actually expended in support of those project codes. The Court grants the motion of ALPA for summary judgment on this count.

## 5. Seventh Cause of Action (Non-Germane Expenditures):

Finally, plaintiffs challenge that ALPA has not properly calculated its germane and nongermane expenses. Plaintiffs do not dispute the following characterization of their arguments in this cause of action:

1. That ALPA's method of tracking costs and determining which are germane and nongermane is not sufficiently reliable to satisfy its burden of proof;
2. That ALPA is required to, but did not, determine germane costs on an airline-by-airline basis;
3. That ALPA is required to, but did not, treat as nongermane all unspent money in its Major Contingency Fund ("MCF");
4. That ALPA has not properly allocated "indirect" or "overhead" costs;
5. That ALPA should have treated all costs related to air safety activities as nongermane to collective bargaining.

See ALPA's Mem. in Supp. Mot. Summ. J. at 21; Pls.' Oppn. to ALPA's Mot. Summ. J. at 29. The burden of proof for this count is on ALPA to prove that its calculation of germane/nongermane expenses is proper. "Since the unions possess the facts and records from which the proportion of political to total union expenditures can reasonably be calculated, basic considerations of fairness compel that they, not the individual employees, bear the burden of proving such proportion." *Aboud v. Detroit Board of Education*, 431 U.S. 209, 239-40, n.40 (1977), quoting *Railway Clerks v. Allen*, 373 U.S. 113, 122 (1963).

ALPA's written "Policies and Procedures Applicable to Agency Fees" provide that, at the end of every year,

ALPA must determine which expenditures are germane and which expenditures are not germane to collective bargaining, and report those expenditures in a "Statement of Germane and Nongermane Expenses" ("SGNE"). ALPA creates the SGNE by dividing its project codes into germane and nongermane categories, and then calculating the amount spent on each code. ALPA's 1992 SGNE<sup>6</sup> includes six pages of notes to explain the expenditures and a 22-page "breakdown of germane and nongermane expenses by project." Arb. Ex. 11. Plaintiffs dispute the exact date that ALPA issued the 1992 SGNE, but it appears that ALPA issued the SGNE at least a year after plaintiffs filed this lawsuit.

A number of pilots challenged the 1992 SGNE and requested arbitration under ALPA's policies and procedures. Included among the challengers were the four original nonunion plaintiffs in this case. On January 21, 1994, plaintiffs filed a motion in this Court for preliminary injunction, seeking to enjoin the arbitration proceedings,

<sup>6</sup> The 1992 SGNE figures are:

Germane expenses:		
Negotiations	\$29,808,426	
Grievances	3,164,603	
Union administration	8,947,343	
General administration	13,639,425	
	55,559,797	81.00 %
Nongermane expenses:		
Litigation	\$ 8,334,236	
Organization	1,160,688	
Charitable	122,966	
Insurance	663,352	
Legislative	903,247	
Publications	1,639,914	
AFL-CIO	211,128	
	13,035,531	19.00 %
Total expenses	\$68,595,328	100.00 %

which were scheduled to begin on January 24. The Court denied the motion. An arbitrator from the American Arbitration Association ("AAA") held three days of hearings in January, February, and March 1994, and issued his Opinion and Award on August 10, 1994. After some confusion about which challengers were proper parties to the arbitration,<sup>7</sup> the arbitrator determined that 158 nonunion pilots were proper challengers. According to the arbitrator's opinion, 174 pilots initially requested arbitration of the agency fee. Thereafter, a number of challengers indicated that they wished to withdraw from the arbitration in order to join in the present litigation in federal court. By comparing the list of challengers in the arbitration award to the list of pilots who were permitted to intervene in this lawsuit by Order of December 8, 1994, the Court finds that, out of the 154 nonunion pilots in this case, 62 pilots were not parties to the arbitration and 92 pilots were parties to the arbitration. Plaintiffs' counsel attended the arbitration and, along with ALPA's counsel, was given a full opportunity to present oral and documentary evidence, to examine and cross-examine witnesses, and to file briefs or written comments.

Taking the expenses as claimed and audited, the arbitrator reviewed the allocation between germane and non-germane expenses in the 1992 SGNE. *See* Arb. Award at 18. The arbitrator determined that certain expenses that had been charged as germane actually were not germane. The arbitration award directed ALPA to recompute the agency fee charged to nonunion members by subtracting payments to International Federation of Air Line Pilots ("IFALPA") and International Transport Workers ("ITW"), expenses for Newsletter Services, and all expenses linked to the Department of Government Affairs.

<sup>7</sup> *See* Arb. Award at 1-6 ("The situation regarding the preference for court litigation, as contrasted to arbitration under the AAA rules, is somewhat confusing even for pilots who have more than average intelligence." *Id.* at 5).

Aside from those categories, the arbitrator found that ALPA's computation of germane and nongermane expenses in its 1992 SGNE were supported by the evidence and applicable Court decisions, such as *Lehnert v. Ferris Faculty Assn.*, 500 U.S. 507 (1991); *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986); *Ellis v. Railway Clerks*, 466 U.S. 435 (1984); *Crawford v. Air Line Pilots Assn. Intl.*, 992 F.2d 1295 (4th Cir. 1993) (en banc); and *Pilots Against Illegal Dues v. Air Line Pilots Assn.*, 938 F.2d 1123 (10th Cir. 1991).

Specifically, the arbitrator rejected the challengers' claim that an expenditure may not be allowed as a germane expense without a detailed explanation of every claimed expenditure. The arbitrator found that ALPA had provided ample detail to justify its expenditures though project listing and explanation of the nature of the expenditures. Moving on to the merits, the arbitrator found that all expenses related to the Major Contingency Fund ("MCF") for 1992 were germane and properly charged to non-member agency fee payers. Next, he found that ALPA's costs relating to air safety activities were germane expenses, especially in light of the Supreme Court's decision in *Lehnert*. The arbitrator found that rent charges, including utilities, were allocated by project which were then separated into germane and nongermane expenses, so those charges were appropriately classified. The arbitrator found that expenses such as salaries, other expenses of officers and employees, and costs of facilities and equipment were germane. Finally, the arbitrator rejected the argument of the Delta pilots that they should be charged only for those expenses that were related to the negotiation of the Delta contract and the cost of servicing that contract.

At issue in the present case is to what extent, if any, the Court may defer to the factual findings of the arbitrator. Although the Supreme Court has held that the union is required to provide arbitration procedures in

RLA agency shop disputes, it is not clear what effect an arbitration award would have on subsequent or concurrent litigation. In establishing a procedure for these types of cases to be resolved through arbitration, the *Hudson* court noted that "[t]he arbitrator's decision would not receive preclusive effect in any subsequent [legal] action." *Hudson*, 475 U.S. at 308, n.21. It is thus clear that the arbitration does not have preclusive effect, but the Supreme Court has not directed the district courts in how much they may defer to the arbitrator's findings.

The parties and the Court were able to find only one case clearly on point, *Bromley v. Michigan Education Association-NEA*, 843 F. Supp. 1147 (E.D. Mich. 1994), appeal pending, Nos. 94-1164, 94-1210 (6th Cir.). In *Bromley*, as in the present case, a *Hudson*-type arbitration was held and an Arbitration Opinion and Award issued before the issues at the federal district court became ripe for disposition. The *Bromley* plaintiffs argued that the determinations of the arbitrator could be "virtually ignored," while the defendants maintained that the trial court could and should defer to the factual findings of the arbitrator. After considering the arguments of the parties, the court held, "[u]nless the arbitration award is to have a significant impact in subsequent judicial proceedings, the procedure spawned by the Supreme Court is largely a waste of time and money. . . . [I]t is the opinion of the Court that it is desirable and consistent with developing case law to give as much deference to the arbitration award as is consistent with the mandate of § 1983." \* *Bromley*, 843 F. Supp. at 1153-54.

The Seventh Circuit discussed the arbitration process in *Hudson v. Chicago Teachers Union, Local No. 1*, 922 F.2d 1306, 1314 (7th Cir. 1991):

Requiring the federal courts to micromanage the fee calculation in every case challenging a union's fair

\* The plaintiffs in *Bromley*, like *Hudson*, were public school teachers, so the case was brought under 42 U.S.C. § 1983 (1988).

share fee would place an overwhelming and unrealistic burden on the courts. . . . Were we to accept plaintiffs' invitation and provide a hearing and judicial determination of the correctness of the fee, we would in effect render redundant and irrelevant the requirements that an impartial decisionmaker hear the dispute and that an escrow account be provided for the amounts reasonably in dispute while the challenge is pending. The proper procedure employs each of the three prerequisites identified by the Supreme Court: the fair share notice provides the basis for a challenge to the fair share fee assessment; the impartial decisionmaker determines the correctness of the fee amount; and the escrow protects the challenger's funds pending such a decision. . . . Of course, the impartial decisionmaker's determination is not the final word on the challenge. *If* the decision is adverse to the plaintiffs, they may *subsequently* seek review by a federal court.

*Id.* at 1314.

In light of the sparsity of case law and in light of the Court's decision to grant summary judgment for defendants on all other issues in this case, the Court requests further briefing from plaintiffs and ALPA with respect to the effect of *Hudson*-type arbitration on federal court litigation brought pursuant to the Railway Labor Act. In particular, the briefs shall address the following issues: (1) under the RLA, what deference should the Court give to the decision of the arbitrator where 62 out of the 154 nonunion plaintiffs were not parties to the arbitration; (2) what benefit, if any, did the nonunion members who were not parties to the agency fee arbitration receive from the award of the arbitrator; (3) assuming that the role of the Court is to review the decision of the arbitrator rather than holding a trial *de novo*, what standard of review should the Court use; (4) under the RLA, what power, if any, does a union have to require nonmembers to ex-

haust arbitration remedies in an agency fee dispute before bringing the claim in federal court; and (5) any other issues that plaintiffs or ALPA believe may have an impact on this decision.

### CONCLUSION

The Court concludes that there is no genuine issue as to any material fact and that ALPA is entitled to judgment as a matter of law with respect to all claims except for the claim in plaintiffs' seventh cause of action that ALPA did not properly calculate its germane and non-germane expenses in its 1992 SGNE. Except for that issue, which the Court reserves to determine upon further briefing, plaintiffs have presented no facts that might affect the outcome of the suit under the governing law. Furthermore, as the only allegations against Delta were those that involved its connections to ALPA or its involvement in the alleged "secret agreement," the Court requests briefing as to whether any cause of action remains against Delta. On its own motion, the Court will also dismiss plaintiff Bruce R. Booher, the only plaintiff who is a member of the union. As the remaining issue concerns only nonunion members, plaintiff Booher has no cause of action and thus cannot possibly win relief. *See Best v. Kelly*, 39 F.3d 328, 331 (D.C. Cir. 1994). An appropriate Order will issue.

/s/ Norma Holloway Johnson  
NORMA HOLLOWAY JOHNSON  
United States District Judge

Dated: April 28, 1995

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[Filed Apr. 28, 1995]

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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Civil Action No. 91-3161 (NHJ)

ROBERT A. MILLER, *et al.*,  
v. *Plaintiffs,*

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, *et al.*,  
*Defendants.*

---

ORDER

Upon consideration of the motion of defendant, Air Line Pilots Association, International ("ALPA"), for summary judgment, the supporting and opposing memoranda, the entire record herein, including the record of the arbitration and the arbitrator's Opinion and Award, and for the reasons outlined in the Memorandum Opinion issued on this date, it is this 28th day of April, 1995.

ORDERED that the motion of ALPA for summary judgment be, and hereby is, granted as to issues 1, 2, 3, and 4 as listed on page 3 of the Memorandum Opinion issued on this date; it is further

ORDERED that the parties submit further briefing on issue number 5:

Seventh Cause of Action (Non-Germane Expenditures):

Plaintiffs allege that portions of fees paid by non-member pilots in 1992 under the Supplemental Agreement were used for purposes not germane to collective bargaining. Complaint at XI;

according to the following schedule: memorandum by defendant ALPA shall be due within fourteen days; memorandum by plaintiffs shall be due fourteen days thereafter; there shall be no replies. It is further

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ORDERED that Bruce R. Booher be, and hereby is, dismissed *sua sponte* as a plaintiff in this action pursuant to Fed. R. Civ. P. 12(b)(6).

/s/ Norma Holloway Johnson  
NORMA HOLLOWAY JOHNSON  
United States District Judge

[Filed Aug. 2, 1993]

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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Civil Action No. 91-3161

ROBERT A. MILLER, *et al.*,  
*Plaintiffs,*

v.

AIR LINE PILOTS ASSOCIATION INTERNATIONAL,  
DELTA AIR LINES, INC.,  
*Defendants.*

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MEMORANDUM OPINION

Plaintiffs in the above-captioned case are union and nonunion pilots employed by defendant Delta Air Lines ("Delta") and represented by defendant Air Line Pilots Association ("ALPA"), the exclusive collective bargaining representative for all pilots employed by Delta. In this action, plaintiffs challenge an "agency shop" agreement entered into by Delta and ALPA on November 1, 1991. This agreement became effective on January 1, 1992. Currently pending before the Court are the parties' cross-motions for summary judgment. Also pending before the Court is plaintiffs' motion to amend the complaint. Upon consideration of the parties' motions, the supporting memoranda, the entire record herein, and for the reasons outlined below, the Court will grant in part and deny in part the cross-motions for summary judgment.

BACKGROUND

Labor-management relationships in the airline industry are controlled by the Railway Labor Act ("RLA"), 45

U.S.C. §§ 151-188 (1988). In 1951, Congress amended the RLA to permit employers and unions to execute "agency shop agreements," which would require union-represented employees who chose not to be union members to contribute financial support to the union for its collective bargaining activities on their behalf. *See* 45 U.S.C. § 152, Eleventh.

ALPA has represented Delta pilots for several decades. In 1972, ALPA and Delta entered into an agency shop agreement, which was subsequently rescinded, in 1973, through a "secret ballot" of Delta union pilots. Delta did not enter into another agency shop agreement until November 1, 1991; at that time, Delta and ALPA negotiated the "contract maintenance" agreement (hereinafter "Supplemental Agreement") that is at issue in this case.

In December 1991, plaintiffs filed this lawsuit, seeking declaratory and injunctive relief to prevent implementation of the Supplemental Agreement. The seven counts of the complaint challenge the legality of the Supplemental Agreement on the following grounds:

- (1) A provision in ALPA's policy manual prohibits ALPA from entering into an agency shop agreement without a secret ballot vote of the ALPA members at the airline involved;
- (2) ALPA must permit nonmembers, as well as members, to participate in any vote concerning an agency shop agreement;
- (3) A provision of the Delta agency shop agreement which calls for a vote of ALPA members prior to renewal of the agreement is unlawful because it does not provide for the participation of nonmembers in such a vote;
- (4) The Supplemental Agreement unlawfully requires payment of dues owed prior to its effective date;

- (5) The Supplemental Agreement does not expressly provide for a reduction or partial rebate of service fees to nonmembers who object to paying for union activities that are not germane to collective bargaining;
- (6) The grievance procedure established in the Supplemental Agreement does not provide a mechanism for challenging the collection of amounts used for purposes not germane to collective bargaining; and
- (7) Portions of fees paid by nonmember pilots under the Supplemental Agreement will be used for purposes not germane to collective bargaining.

Because the effective date of the agreement was January 1, 1992, plaintiffs' complaint was accompanied by a motion for preliminary injunction. By Order dated December 31, 1991, the Court denied plaintiffs' motion for preliminary injunction, finding that plaintiffs had failed to establish a substantial likelihood of success on the merits of their claims.

On October 8, 1992, after defendants had filed their answers and the parties had fully briefed their cross-motions for summary judgment, plaintiffs filed a motion for leave to amend the complaint. The proposed amended complaint adds two new claims: (1) that there existed an illegal "secret agreement" between ALPA and Delta, and (2) that plaintiffs are entitled to an "independent audit" of ALPA's annual allocation of its expenditures as germane or nongermane to collective bargaining, and that ALPA failed to conduct such an audit. Defendants have opposed plaintiffs' motion to amend.

## DISCUSSION

### A. *The Parties' Cross-Motions for Summary Judgment*

The Court will consider in turn each of the claims advanced by plaintiffs in support of their contention that the Supplemental Agreement is unlawful.

### 1. *The Requirements of the ALPA Policy Manual*

Plaintiffs argue that Parts 3A and 3B of the ALPA Administrative Manual require ALPA to conduct a vote of Delta union pilots prior to entering into an agency shop agreement. The provisions upon which plaintiffs rely state as follows:

#### Part 3A—*Agency Shop and Dues Checkoff*

ALPA shall, with concurrence of the respective pilot group, negotiate a "dues checkoff" procedure into each agreement. In addition, on those airlines where a demonstrated need exists, ALPA shall negotiate security clauses which may embody Dues Checkoff, Agency Shop or any other type of plan that is necessary to provide more member support for ALPA activities undertaken in their behalf as pilot employees.

#### Part 3B—*Agency Shop*

When the number of non-members on an airline represented by ALPA exceeds two percent of the pilots reflected on the Company's system Seniority List and after such time as a simple majority of the ballots returned by the membership of that airline has approved the provisions of an Agency Shop, ALPA shall negotiate an Agency Shop provision with such airline.

Plaintiffs interpret the first sentence of Part 3A, "concurrence of the respective pilot group," to require a vote among union pilots at the airline, whenever a "dues check-off" procedure is negotiated. Furthermore, plaintiffs read this voting requirement into the second sentence of Part 3A; they claim that "the second sentence of 3.A [is] a continuation of the first sentence, so that the provision in the first sentence of acting 'with concurrence of the respective pilot group' is carried into the second sentence." Plaintiffs' Memorandum in Opposition to Defendants'

Motion for Summary Judgment (hereinafter "Pl. Opp.") at 19. However, the language of Part 3A does not compel this result. The plain language of Part 3A states only that "concurrence of the respective pilot group" is required prior to negotiation of "dues checkoff" procedures, not other plans negotiated by ALPA.

ALPA points out that it has consistently interpreted Part 3A to allow ALPA to negotiate an agency shop or other form of union security, without any requirement of a membership ballot. Such an interpretation is entirely reasonable, given the language of Part 3A. Furthermore, ALPA states that Part 3B requires ALPA to negotiate an agency shop when two conditions exist: (1) the number of non-members exceeds two percent of the pilots, and (2) a majority of the member pilots have voted in favor of an agency shop. Under ALPA's interpretation of the interaction of Parts 3A and 3B, then, Part 3B addresses situations where ALPA is *required* to negotiate an agency shop, while Part 3A addresses situations where ALPA *may* negotiate an agency shop. Plaintiffs, on the other hand, would read Part 3B to supersede Part 3A because it was adopted two years later. Under plaintiffs' interpretation, Part 3B establishes two conditions precedent to the negotiation of *any* agency shop agreement.

A reviewing court should give "considerable deference" to the interpretation of a union's constitution, rules, or regulations by officials of that union. *Monzillo v. Biller*, 735 F.2d 1456, 1458 (D.C. Cir. 1984). Such an interpretation should not be overruled "unless the court finds that the interpretation was unreasonable or made in bad faith." *Id.* In this case, the Court finds defendants' interpretation of the ALPA Administrative Manual provisions entirely reasonable. Moreover, plaintiffs have not offered any evidence of bad faith. Thus, the Court concludes that Parts 3A and 3B of the ALPA manual do not require ALPA to conduct a secret ballot vote prior to entering into an agency shop agreement.

## 2. ALPA's Failure to Conduct Ballot of Members and Nonmembers on Agency Shop Agreement

Plaintiffs argue that ALPA was required to ballot both union members *and* nonmembers prior to ratification of the agency shop agreement. In support of this contention, plaintiffs rely exclusively on *American Postal Workers Union, AFL-CIO, Headquarters Local 6885 v. American Postal Workers Union, AFL-CIO*, 665 F.2d 1096 (D.C. Cir. 1981) (hereinafter "Local 6885"), and the decision in that case on remand, *Local 6885*, 113 L.R.R.M. (BNA) 2433, 1982 WL 2198 (D.D.C. 1982).

Plaintiffs claim that, under the D.C. Circuit's holding in *Local 6885*, ALPA's failure to ballot union members on the agency shop agreement violated section 101(a)(1) of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. § 411(a)(1) (1988). In *Local 6885*, a parent union had negotiated a collective bargaining agreement for one of its local unions without complying with an explicit requirement of its own constitution calling for membership ratification of all collective bargaining agreements. The D.C. Circuit did hold that the union's failure to afford members of the local the same right to vote on the collective bargaining agreement as it afforded other union members was a violation of the "equal rights" provision of the LMRDA, 29 U.S.C. § 411(a)(1). However, that holding was based upon the provision in the union's national constitution which gave *all* union members the right to ratify collective bargaining provisions. As the D.C. Circuit pointed out, section 411(a)(1) "itself accords no voting rights to a union membership, but it does mandate that rights given to some members be available to all." *Local 6885*, 665 F.2d at 1101. The union had interpreted its national constitution to grant ratification rights only to national units; *Local 6885* simply held that such rights must be granted to all union members.

Unlike *Local 6885*, plaintiffs in this case can point to no provision in ALPA's constitution, rules, or regulations

which would require ALPA to conduct a ballot of either its members or nonmembers prior to ratification of any agency shop agreement; the "equal rights mandate" of § 411(a)(1) is therefore not implicated here.

Plaintiffs' reliance on the remand decision in *Local 6885* is similarly misplaced. The issue on remand which is dealt with in the district court's opinion concerns the question of whether nonmembers of the local union, who were intervenors in the case, were entitled to share in the damages to be awarded against the parent union. The district court held that they were entitled to damages:

Since the union admittedly breached its duty to the local with respect to the ratification phase [of the collective bargaining agreement], it was certainly foreseeable that the damages flowing from that breach would affect the non-member employees as well. If the union's failure to submit the contract for ratification showed a disregard of the interests of the local, it certainly also showed a similar disregard for the interests of the intervenors.

*Local 6885*, 1982 WL 2198 at \*2. The court's determination that the union had breached its duty of fair representation to nonmembers thus clearly depended upon the D.C. Circuit's determination that the union had also breached that duty for local union members. However, no such situation exists here. ALPA has not breached any contractual duty to its member pilots; thus, even if nonmembers were entitled to some of the same rights that union members enjoy, no rights of union members have been violated in this case.

### 3. *Participation of Nonmembers in Union Vote on Renewal of Agency Shop Agreement*

Plaintiffs claim that the agency shop agreement is invalid on its face because section A.9 of the agreement does not expressly allow nonmembers as well as members

to vote on renewal of the agreement. Section A.9 provides as follows:

It is understood and agreed that 90 days prior to the amendable date of this Agreement the Association shall cause a vote to be taken of all members in good standing at that time to determine if they desire that this membership provision continue in full force and effect for the balance of this agreement and thereafter.

Plaintiffs again rely upon the district court remand decision in *Local 6885* for the contention that nonmembers are entitled to the same rights as members and that therefore this provision violates ALPA's duty of fair representation to nonmembers. However, as the Court has already pointed out above, *Local 6885* does not establish so broad a proposition. In fact, the district court expressly found that nonunion employees "are, of course, not entitled to the rights of union members." *Local 6885*, 1982 WL 2198 at \*1. Thus, the Court will reject this claim.

### 4. *Payment of Dues Owed Prior to the Effective Date of the Agency Shop Agreement*

Section 27.A.1 of the Delta agency shop agreement states that a nonmember pilot is obligated to pay a service charge to ALPA "sixty (60) days after the effective date of this Agreement or the completion of his probationary period, whichever is later . . . ." The effective date of the agreement is November 1, 1991; therefore, nonmember pilots are obligated to begin paying agency fees on January 1, 1992, at the earliest. Plaintiffs argue that section 27.A.3 of the agreement makes it possible for ALPA to compel payment of union dues and assessments incurred prior to the effective date. Section 27.A.3 provides:

If a pilot covered by this Agreement is, at the time of implementation of this agreement delinquent, or becomes delinquent in the payment of fees, dues and

assessments . . . the Association shall notify him . . . that he is delinquent and is subject to discharge as a pilot of the Company. Such letter shall also notify the pilot that he must remit the required payment within a period of fifteen (15) days or be discharged.

Plaintiffs argue that, because the phrase "the time of implementation of this agreement" means January 1, 1992, this section allows ALPA to penalize nonmembers for delinquencies incurred prior to that date. However, ALPA points out that the payment obligation defined in section 27.A.1 only begins on January 1, 1992; thus, there can be no delinquency incurred prior to that date. ALPA claims that the phrase refers to that time when pilots first become susceptible to discharge under the agreement.

More importantly, ALPA agrees that it cannot lawfully seek the discharge of any pilot for failure to pay any financial obligation which accrued prior to January 1, 1992. Furthermore, it has assured the Court that it will not do so. Plaintiffs have thus received the relief they seek under this claim.

The remaining claims will be denied without prejudice to renewal following further proceedings, including the additional round of discovery.

SO ORDERED.

/s/ Norma Holloway Johnson  
NORMA HOLLOWAY JOHNSON  
United States District Judge

Dated: July 30, 1993

# AMERICAN ARBITRATION ASSOCIATION

AAA Case No. 16-673-00277-93DS

In the Matter of the Arbitration

between

AIR LINE PILOTS ASSOCIATION (ALPA),  
Union

and

AGENCY FEE CHALLENGERS  
Challengers

(Agency Fee Arbitration)

## AMENDED OPINION & AWARD

The instant agency fee arbitration was the subject of hearings held on January 24, February 24, and March 28, 1994, before the undersigned duly appointed Arbitrator. All parties were given a full opportunity to present oral and documentary evidence, to examine and cross-examine witnesses, and to file briefs or written comments. A hearing had been scheduled for April 26, 1994 and, pursuant to the agreement of counsel for the Union and Challengers that further evidence was not needed and that the record was complete, except for certain matters received by stipulation, the hearing scheduled for April 26 was canceled.

Challengers were advised of an opportunity to request the transcript of the hearings. None of the Challengers requested the record.

Briefs, reply briefs, and second reply briefs were received from counsel for the Union and counsel for some Challengers, and have been fully considered. Comments from some individual Challengers received before, during, and after the hearing have been considered.

Based on the evidence and the submissions of all parties to this proceeding the undersigned makes the following findings and Award.

### *I. Introduction*

The original request for arbitration of challenges to the Union's determination of the fair share fee, also called agency fee, payable by non-members, involved 174 Challengers, based on information provided by the Union to the American Arbitration Association.

Thereafter, a number of the Challengers indicated that they wished to withdraw from the instant arbitration and to, instead, join in litigation in the Federal District Court relating to this matter that had been filed by Mr. Hudock on behalf of four named agency fee payers and one Union member. There was substantial correspondence among Challengers expressing a preference for a court determination, counsel for the Union and the Challengers, and the undersigned Arbitrator.

A set of letters were received from Challengers indicating a preference for a court determination, but also wishing to protect their right to protest the Union's determination of the agency fee through arbitration.

The Challengers' counsel sought to enjoin the instant arbitration. The District Court for DC denied the request to enjoin the instant arbitration. As a result of the court's ruling, Mr. Hudock participated in the arbitration procedures on behalf of a number of Challengers. Among the issues to be resolved is a determination of who are the Challengers covered by the instant arbitration.

We shall address each of the issues raised in this proceeding at the hearing, by briefs or by comments from Challengers, topic-by-topic.

### *II. Challengers*

The Union's procedure, relating to the filing of a challenge to the agency fee charged to non-members, provides, in relevant part, for the Union to advise agency fee payers of the Statement of Germane and Non-Germane Expenses (SGNE) for the prior year as a basis for determining the fee payers payments. The evidence reveals that the SGNE statement for 1992 was prepared in June 1993 and dated June 14, 1993. The record is not clear as to when it was mailed to the agency fee payers.

The record does establish that, pursuant to the Union's policy of having the American Arbitration Association process such challenges to the agency fee, it submitted a list of such Challengers by letter of September 29, 1993 and requested that the American Arbitration Association (AAA) appoint an arbitrator and process the challenges under its Rules for Impartial Determination of Union Fees. That list, as later corrected, contained 174 names and addresses.

Among the Challengers listed were four non-member agency fee payers and one Union member who had filed a suit in the District Court for the District of Columbia seeking to have the matter heard in court and who also sought to enjoin the instant arbitration.

A number of Challengers advised the AAA that they preferred a court determination and some stated that they would only participate in the arbitration if it followed court procedure and court precedent.

The undersigned advised all listed Challengers, through the AAA, by letter of November 22, 1993, that the procedures to be followed were those set forth by the AAA; that the burden of proof was on the Union; that the arbi-

tration would proceed so long as there was at least one Challenger; the arbitration would proceed unless and until enjoined; and court decisions and other relevant case law would be applied in determining the appropriate agency fee.

Thereafter, the AAA received withdrawals from the arbitration and requests to revoke earlier withdrawals and designations of Mr. Hudock as the counsel representing some Challengers.

In their briefs, the Union argues that the number of challenges is now 90, and enclosed a list of those Challengers. It contends that the agency fee payer had to submit a written objection during 1992; only non-members could file a challenge to the SGNE; the request for arbitration had to be within 30 days after receipt of the SGNE; and any Challenger, who had withdrawn from the arbitration, was thereafter excluded. It notes requests after September 29, 1993 were untimely.

Counsel for a group of Challengers, claiming to represent 159\* non-member pilots, argues that the Union seeks to exclude all Challengers; that the requirement to file objections during 1992 was unrealistic because of confusion in the 1992 report relating to 1990 and 1991. It argues that the Union did not submit its SGNE timely within 30 days and cannot now seek to enforce its own rules which it violated.

The undersigned arbitrator has found that, of the original 174 Challengers listed by the Union in its letter to the AAA, 35 pilots apparently withdrew from this arbitration. Some 25 of those individuals have requested representation by Mr. Hudock and have so advised the AAA and/or are listed by Mr. Hudock as pilots whom he represents.

The Union and Mr. Hudock executed a stipulation, dated April 27, 1994, providing that the AAA should

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Supplemented by four more clients by letter of June 27, 1994.

send letters to 75 listed pilots advising them of their right to obtain copies of the transcripts and exhibits and of their right to file comments with the AAA by May, 27 1994.

The original number of Challengers listed in the Union's submission of this matter to the AAA was 174. Absent evidence that any pilot seeking to be added to that list of 174 had been denied the opportunity to file a challenge to the SGNE prior to September 29, 1993, we find no reason to add to that list of Challengers, which reflected the maximum number of pilots who had met the conditions to file a challenge to the SGNE. Since we have not been furnished any evidence as to why any non-member agency fee payer should be added to that list, we shall not expand the list beyond that number.

We next come to the question of withdrawals from the status as Challenger by any pilot listed in the original list of Challengers. The situation regarding the preference for court litigation, as contrasted to arbitration under the AAA rules, is somewhat confusing even for pilots who have more than average intelligence. Bearing in mind that this is the first arbitration of agency fees, despite earlier challenges by non-members of the Union, we believe the purpose for permitting a challenge to the agency fee, payable by non-members, will be served by permitting those who did withdraw from the arbitration to be included when they later either advised the AAA that they rescinded their withdrawal or elected to be represented by Mr. Hudock in the arbitration. We shall not, however, permit additional non-members to become parties, absent evidence that they did not receive the SGNE or did not know of the contents of the SGNE and of their right to challenge that report. The list of Challengers included in the instant proceeding, based on our decision regarding the status of those that withdrew, directly rescinded their withdrawal or rescinded it by requesting representation by counsel, or did nothing after initially filing a challenge, is attached as Appendix A.

## II. Dues Calculations

The Union's dues structure consists of assessing all members a charge of 2.35% of the members' earnings as reflected on the members' W-2 issued by the airline. That dues rate has existed since 1985.

Some Challengers have raised questions regarding the collection of dues based on income earned in a preceding year and reported in the 1992 calendar year. They have raised questions regarding dues charged against vacation pay.

The undersigned has no role to determine the amount of dues and, therefore, no right to inquire into how dues are collected, what the amount is or what the Union uses as the base for its calculation. Whether the Union's dues are \$100 per year or \$2,500 per year is not within the purview of this proceeding. This agency fee determination is confined to the issue of whether the expenses charged to non-member agency fee payers are germane to the Union's representation functions, i.e., negotiations and implementation of the agreement and those expenses involved in the Union's fulfilling its duties as the exclusive representative of employees. (See *Ellis v. Brotherhood of Railway and Steamship Clerks*, 466 U.S. 435 (1984)).

## IV. Union Structure

The record indicates that the Air Line Pilots Association (ALPA) operates as a national union with a single staff, single set of receipts and one set of expenditures covering all of its operations. It functions through a Board of Directors which has an Executive Board, then through an Executive Council and President. There is an Executive Administrator, various Vice Presidents, and a General Manager. There are eleven departments responsible for the following functions: Engineering and Safety, Representation, Legal, Accident Investigation, Communications, Government Affairs, Finance, Office Administration, Information, Retirement and Insurance and Human

Resources. There are also subcomponents in some departments.

The Union negotiates a separate collective bargaining agreement for each of 36 airlines. The collective bargaining agreements are negotiated by a Master Executive Council elected by the Union's members at the respective airlines. There are also local councils (LEC's) which may cover geographic areas, which exist within the Master Executive Council (MEC). Although the MEC's have some degree of autonomy in negotiating with their respective carriers, they are subject to policies established by the Union's governing bodies. The MEC's, which do the negotiating, are assisted by staff from the Union. The members doing the negotiating are reimbursed by the Union for lost pay when involved in performing such services.

Grievances, in large part, are presented by the staff from the Union's Representation Department who are generally attorneys.

The Challengers contend that, because there are no nationwide master agreements covering more than one airline and each collective bargaining agreement is separate, the costs of negotiating and servicing each airline collective bargaining agreement should be charged against that carrier's members and cites cases in support.

ALPA contends that it does coordinate bargaining strategy on a national basis; that national staff are involved in negotiations; and each negotiation does impact other negotiations.

In addition, the Union cites several cases to support the unified dues structure and charges as contrasted to separate carrier-by-carrier charges.

In the view of the undersigned, this issue was disposed of by the Court of Appeals for the Fourth Circuit in *Crawford v. Air Line Pilots Association*, 992 F2d. 1295

(1993) (Cert. Denied) 143 LRRM 2185, where the Fourth Circuit stated, in relevant part:

## II

The principal complaint of the objecting nonunion pilots concerns ALPA's use of their agency fees to support strikes and other activities of bargaining units at airlines where they are not employed. Closely related is their complaint that ALPA used their agency fees to support the major contingency fund. The nonunion pilots assert that use of agency fees for expenses related to bargaining outside the unit at the airline where a pilot works violates both the Railway Labor Act and their constitutionally protected rights of free association.

Section 2. Eleventh of the Railway Labor Act provides that regulated carriers and unions may agree that "as a condition of continued employment, all employees shall become members of the labor organization representing their craft and class." 45 U.S.C. § 152, Eleventh (a). This provision was added to the RLA in 1951. Five years later, the Supreme Court sustained the agency-fee provisions of the RLA against attack on their facial constitutionality under the First and Fifth Amendments. *Railway Employees Department v. Hanson*, 351 U.S. 225, 238 [38 LRRM 2099] (1956). At the same time, it found that the requirement that unwilling workers pay agency fees to the union might under other circumstances pose a constitutional problem, since the enactment of § 2, Eleventh is "the governmental action on which the Constitution operates, though it takes a private agreement to invoke the federal sanction." *Hanson*, 351 U.S. at 232.

The intrusion into individual freedom of choice is justified by Congress' desire to ensure "[i]ndustrial peace along the arteries of commerce," *Hanson*, 351

U.S. at 233, and by the need to reduce labor friction through "the elimination of the 'free riders'—those employees who obtained the benefits of the unions participation in the machinery of the Act without financially supporting the unions." *International Ass'n of Machinists v. Street*, 367 U.S. 740, 761-62 [48 LRRM 2345] (1961). However, the RLA does not give "unions, over an employee's objection, the power to use his exacted funds to support political causes which he opposes." *Street*, 367 U.S. at 768-69 [footnote omitted].

*Lehnert v. Ferris Faculty Ass'n*, 111 S.Ct. 1950 [137 LRRM 2321] (1991), concerned not a carrier regulated by the RLA but a public-employee union exacting agency fees pursuant to a state statute. However, "[b]ecause the Court expressly has interpreted the RLA 'to avoid serious doubt of [the statute's] constitutionality,' the RLA cases necessarily provide some guidance regarding what the First Amendment will countenance in the realm of union support of political activities through mandatory assessments." *Lehnert*, 111 S.Ct. at 1957 (citations omitted). Examining the prior cases, the Court deduced that the constitutionality of challenged agency-fee expenditures must be measured against a three-part test. Chargeable activities must (1) be "germane" to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding "free riders"; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.

111 S.Ct. at 1959.

Applying these principles, the Court specifically rejected the agency-fee objectors' contention that the "local union may not utilize dissenters' fees for activities that, though closely related to collective bargaining generally, are not undertaken directly on behalf

of the bargaining unit to which the objecting employees belong." The Court found this contention "to be foreclosed by our prior decisions." 111 S.Ct. at 1959. To require that expenses concern the specific bargaining unit "would be to ignore the unified-membership structure under which many unions, including those here, operate." 111 S.Ct. at 1961. Under this structure, "[t]he essence of the affiliation relationship is the notion that the parent will bring to bear its often considerable economic, political, and informational resources when the local is in need of them. Consequently, that part of a local affiliation fee which contributes to the pool of resources potentially available to the local is assessed for the bargaining unit's protection, even if it is not actually expended on that unit in any particular membership year." 111 S.Ct. at 1961.

The Court recognized limitations on the union's power to spend exacted fees for bargaining activities unrelated to the bargaining unit: the Constitution bars "a direct donation or interest-free loan to an unrelated bargaining unit for the purpose of promoting employee rights or unionism generally," as well as a "contribution by a local union to its parent" that is "in the nature of a charitable donation." 111 S.Ct. at 1961. Nevertheless, extra-union bargaining expenditures are legitimate if there is "some indication that the payment is for services that may ultimately enure to the benefit of the members of the local union by virtue of their membership in the parent organization." 111 S.Ct. at 1961-62. Among the expenditures approved by the *Lehnert* Court in this context were funds used to prepare for a potential strike. The Court upheld the district court's findings that such preparations are "reasonable bargaining tools." 111 S.Ct. at 1965.

[1] The holding in *Lehnert*, read in conjunction with the district court's extensive findings of fact, makes

the union's case for the challenged expenditures, if anything, stronger than it had been under previous precedent. ALPA's "unified-membership structure," 111 S.Ct. at 1961, is even tighter than that of the union in *Lehnert*. As the district court found, negotiations at other airlines were not only germane to the bargaining process at each airline bargaining unit, but in essence determined the result of the bargaining process. Expenditures to prevent the extraction of concessions from ALPA by individual airlines handily meet the *Lehnert* test. Because support for the striking pilots was of crucial importance in establishing the union's bargaining position in each airline unit, the requirement that agency-fee objectors provide funds for the strike benefits was clearly justified by the bargaining pattern and practice in the airline industry.

Accordingly, we find that ALPA's use of a single system of expenses without reference to the members particular carrier and a single combined system of charges to agency fee payers without reference to their individual airline employer is proper.

#### V. *Accounting Methods*

The evidence reveals that the Union tracks its expenses by functions through a system of some 1,200 projects. The expenses are charged both to a natural cost category and to a project code, per the testimony and report of the auditing firm. Employee wages and benefit costs are allocated to specific projects based on time records. Rental records allocate cost to the project based on square footage used.

Pilots of various airlines are used by the Union to perform various Union functions, including negotiations, grievance processing, and safety investigations. These non-employees are compensated for their lost earnings and expenses under appropriate project expense items.

The projects are set on a functional basis and are allocated as germane or nongermane based on the nature of the project. The determination of whether a project is germane or nongermane is based on a review of the project function by the Union's Legal Department and its Director of Finance. The project system, as a method of determining germane and nongermane expenditures, has existed since 1986 and, as new projects are established, they are reviewed against guidelines established by the Union's Legal Department.

The 1992 SGNE audit states that an audit was conducted using generally accepted auditing standards, involving examination "on a test basis" of the evidence supporting the amounts claimed.

That audit statement, signed by a well recognized and reputable accounting firm, stated that the stated germane and nongermane expenses were provided based on the Union's methodology which was noted to be as follows:

**NOTE 3—MANAGEMENT DEFINITIONS, SIGNIFICANT FACTORS AND ASSUMPTIONS USED IN THE CATEGORIZATION OF EXPENSES AS GERMANE AND NONGERMANE**

*Germane Expenses*

Under law, individuals who are not members of a union but who are nevertheless compelled to pay union dues or fees under an agency shop are entitled to object to sharing the cost of any union activities not germane to collective bargaining. Such individuals are entitled to a pro rata adjustment for any expenditures that are not germane. Union expenses are considered "germane to collective bargaining" if they are (1) germane to collective bargaining activity, (2) justified by the government's policy interest of promoting labor peace and avoiding "free riders," and (3) not an additional burden on freedom of speech. Included among these costs are expenses in-

curred in connection with the negotiation and administration of collective bargaining agreements, the filing and processing of grievances and arbitration of disputes arising from those agreements, leadership training, and the costs incurred in maintaining the Association as an administrative organization. The specific expenses included in this category are described as follows:

*Negotiations*

This designation included the costs of negotiating agreements with member airlines. Included are major mid-term negotiations, such as occurred at Delta and Northwest; normal mid-term negotiation such as occurred at United; and formal Section 6 contract negotiations. Virtually all represented airlines engaged in one or more of these types of negotiations during 1992. Section 6 negotiations were commenced, continued, or completed during 1992 with Allegheny Commuter Airlines, Air Midwest, Atlantic Southeast Airlines, Atlantic Coast Airlines, Business Express, ComAir, DHL Airways, Henson Airways, Mesaba, Reeve Aleutian Airlines, Ross Aviation Simmons Airlines, States West, Trans World Airways, Trans World Express, and U.S. Air. Negotiation costs include those incurred by the ALPA Negotiating Committee and other officials in the course of meeting, preparing for and conducting negotiations, communicating with pilot groups before and throughout negotiations, and conducting continuing meetings with management representatives to address new issues and resolve disputes as they arise. The expenses of the Associations' Local Councils, Master Executive Councils, and national governing bodies are also included here, since most of

their meetings are devoted to collective bargaining issues. The Associations' aviation safety-related expenses, closely related to its negotiations, are included as well in this category.

#### *Grievances*

Expenses associated with processing grievances and System Board and Retirement Board proceedings to resolve disputes arising under collective bargaining agreements are captured in this category.

#### *Union Administration*

Union Administration costs are those expenses associated with maintaining the Association's institutional structure as a labor union, and include the costs arising from the democratic process. Expenses include flight pay loss and expenses for the Associations' national officers (other than the President), voting and balloting costs, dues billing and collection, and maintenance of agency shop agreements.

#### *General Administration*

This category captures general overhead and administrative expenses associated with maintaining and staffing offices throughout the country. Insurance costs, the President's salary, and the costs of the Association's administrative department and accounting and reporting functions are included in this category.

#### *Nongermane Expenses*

Nongermane expenses include the costs of activities not directly related to collective bargaining. Included among these costs are expenses incurred in helping pilot groups to organize themselves, lobbying and political activities, and some public relations and liti-

gation expenses. The specific expenses included in this category are described as follows:

#### *Litigation*

The Association interprets recent court cases to allow the treatment of most of its litigation as germane and chargeable, at a minimum, to the pilots employed by the airline or airlines affected by the litigation. However, administrative considerations make such an allocation impractical at this time. For purposes of this report, the Association has chosen to treat such litigation as nongermane.

#### *Organizing*

The expenses of the Association's assistance to employees interested in organizing themselves for collective bargaining purposes are treated as wholly nongermane.

#### *Charitable*

The Association's charitable activities include contributions to the United Way, administration and funding of a college scholarship program, and support for a reward program to apprehend terrorists.

#### *Insurance*

The Association administers several insurance programs for active and retired members and their families. That portion of the premiums that is retained by the Association as a fee for administering the programs has been offset against the total cost of providing the insurance, and the net cost is treated as nongermane.

#### *Legislative*

All expenses identified with legislative activity have been treated as nongermane.

### *Publications*

Forty-five percent of the net cost of Air Line Pilot Magazine, after considering subscription and advertising revenue, is treated as nongermane to collective bargaining to reflect the ratio of germane to nongermane materials in the magazine and the Association's other publications. The remaining 55% of expenses is captured in the Negotiations category. The costs of Master Executive and Local Council newsletters are also allocated between Negotiations, a germane category, and Publications, a nongermane category, on the same basis. Media and public relations expenditures have been included in this category as well.

### *Affiliation fee*

The Association's annual per capita payment to the AFL-CIO is treated as nongermane.

The Challenger's counsel contends that the Union has failed to disclose the nature of the projects so that a determination may be made as to germane and nongermane expenditures. The Challengers argue that there is a lack of information for 92% of the projects regarding natural accounting data. They further argue more specifically that various allocations lack sufficient information to delineate between germane and nongermane.

The Challenger's counsel introduced an exhibit, which is a financial report for two years ending December 31, 1992, which showed a difference in the total expenses from that introduced as the SGNE by the Union and asserts that the Union never explained the difference between the two documents. The Challenger's exhibit did not have a break out of germane and nongermane expenses. The Union's financial report, used to determine non-member agency fees, has some differences. The Challenger's exhibit is a consolidated financial statement and

includes expenses and income not found in the statement used to calculate the agency fee payments.

Another statement introduced by the Challenger's counsel constituted a break out of germane and nongermane expenses.

The Union's financial expert stated that the exhibit, offered by the Challengers, was a working statement rejected by the Union because it could not adequately be supported in its allocation of expenses.

The unacceptable worksheet finds that 81% of all expenses, including interest, were chargeable as germane and 19% were not germane. In fact, the "official" SGNE report, furnished to the agency fee payers and used as the working document for this proceeding, has the same percentage allocation of germane and nongermane expenses, with some variations between the totals in both financial reports with the unacceptable report containing somewhat higher dollar figures for each category.

In the absence of any specific requirement regarding the methodology to be used to determine germane and nongermane expenditures, we must conclude that an audited statement of such expenses meets the requirements established by court decisions.

That SGNE, attached as Appendix B, which was sent to the Challengers, does contain sufficient information to permit an intelligent appraisal of the nature of the expenses and the project for which they were expended.

We know of no requirement that the expenses be detailed for each project by categories of salaries, travel, rents, etc. The items are sufficiently identified so that at the hearing the arbitrator and the Challenger's counsel were able to make appropriate inquiry regarding the nature of the expense. In the report of germane and nongermane expenses rejected by the Union because it could not be supported by the records, there was less detail and

the categories were grouped together. We cannot conclude that less detail is preferable in determining how the monies were spent. For example, an item on Challenger's Exhibit F is marked as flight pay loss with a total in excess of \$11 million of which 93-94% is carried as germane. By contrast, the largest dollar expenditure under any project in the SGNE is slightly more than \$4 million for contract negotiations, which may include some payments for lost flight pay to members of the negotiating team.

The SGNE contains detailed project expenditures under broad categories of negotiations, grievances, general administration, union administration, litigation, legislation, publications, organizing, insurance, charity and per capita payments. It permits questions regarding safety items that are identified; it permits inquiry regarding expenditure on TWA-Icahn expenditures; and various categorized office expenses.

Based on all of the above, we find that the SGNE meets all the criteria as a report of expenses categorized as germane and nongermane. We shall proceed from that basis and utilize the SGNE to make specific determinations regarding chargeable germane expenses and the proper percentage of all expenses that could be assessed against non-member agency fee payers.

#### VI. *Burden of Proof*

The case law establishes that the Union bears the burden of establishing the proportion of chargeable expenses which are assessed against non-member fair share fee payers. That obligation is satisfied by a reasonable explanation and evidence which warrants a conclusion that the expenses were relevant to the Union's performance of those representation functions for which non-members may be charged. The Union cannot be expected to detail every dollar that was spent for germane expenses. As noted by the Supreme Court in *Hudson*, they need provide "an adequate explanation" and it recognized that "absolute preci-

sion" could not be expected. The Challengers reliance on the arbitrator's statement that ALPA had the burden of proof of "establishing . . . that the expenses claimed as germane are germane" should not be construed as more than a general statement of the arbitrator's view of the court decisions controlling this case.

The role of ALPA is to provide sufficient information from which a reasonable person could conclude that the expenses claimed for 1992 as germane were spent for functions viewed by the courts and/or administrative bodies dealing with agency fee determinations, to be germane. We need not trace each penny or account for every minute of an employee or officer's time or seek absolute precision, which the Supreme Court recognized was not to be expected.

Our role is not to determine whether X dollars were spent for rent or Y dollars for utilities or Z dollars for the respective officers' salaries. That role is essentially the function of the audit. We have evidence that the figures for 1992 were audited by a recognized accounting firm using accepted accounting principles. We shall not go behind those figures. In accepting the performance of an audit on the 1992 calculations, we have considered the Challenger's counsel's contention regarding a 1991 statement that an audit could not be performed. We also note that, *in fact*, an audit was performed and was signed by a major accounting firm.

Our role is to determine whether the cost allocation claimed to be germane, i.e., spent for negotiation or implementation of an agreement or the performance of representational duties, as contrasted to lobbying or performance of functions not deemed germane, e.g., organizing, is supported by the evidence and, thus, chargeable as germane. If the claimed amount is not fully chargeable as germane, what, if any, part of that expense is chargeable as germane.

It must be noted that our role is not to determine the propriety of payment of legal expenses or any other expense of any Union officer, or any other expenditure, as raised by one Challenger. This proceeding is not intended to inquire into the Union's use of monies. This arbitrator's role is confined to a determination of whether claimed expenditures, as audited, were properly charged as germane expenses related to the performance of representational functions.

Because the Challengers, individually and collectively through counsel, raise questions about the propriety of many expenditures, it is necessary to make abundantly and exquisitely clear that the undersigned has no role to inquire into how the Union spent its treasury—the vast majority of which came from members who are not represented in this proceeding. Rather, our role is predicated on an allocation of the expenses as assessed against non-member agency fee payers. The question is not whether the expenditures were wise. The issue is not whether the expenditures were pursuant to proper authorization. The role of the arbitrator, in our view, does not include any determination of embezzlement of monies by an officer or employee.

We take the expenses as claimed and as audited. From that, we review the allocation between germane (chargeable to agency fee payers) and nongermane (not chargeable to the non-members). This determination is based on the use of the stated expenses, as set forth in the record before us.

Counsel for the Challengers argues that, absent a detailed explanation of every claimed expenditure, it may not be allowed as a germane expense. We disagree. The Union has provided ample detail to justify its expenditures, both by project listing and by explanation of the nature of the expenditures. We shall, on that basis, review the expenditures which may be questionable based on our own

identification of such projects or based on issues raised by Challengers.

## VII. *Major Contingency Fund*

The Union has maintained a Major Contingency Fund (MCF) used for the purpose of having the ability to support a strike affecting one or more carriers which employ its members.

The fund is the result of charging all members and non-member agency fee payers one half percent of their wages as a contribution to that fund.

The Union's constitution provides for such a MCF and provides that payments to the MCF would be suspended when it reached \$50 million.

The Challengers assert that the 1992 SGNE shows revenue of \$195 million and expenditures of approximately \$9 million, leaving a surplus of approximately \$11 million unspent. It argues that the surplus is a loan to the Union and, thus, not properly chargeable as a germane expense to agency fee payers. It notes that no provision exists for a refund of monies over \$50 million to other than members, resulting in a loss of non-member agency fee payers. The Challengers argued for a refund of that 1992 surplus to non-payers.

The Union's Constitution provides:

"The Major Contingency Fund shall be maintained as Association Funds to be separately accounted for, with earnings and appreciation thereon to be a part of such Fund. The Major Contingency Fund shall not be utilized under any conditions as a source of funding for past or current budgeted operational expenses. Such Fund may be utilized only for the following purposes:

- (1) To treat with issues of urgent concern that significantly and adversely affect the airline piloting pro-

fession and which cannot be funded by normal Association budgeting practices and policies."

From that provision, the Challengers argue that use of the MCF to fund general expenses, not related to strikes, is illegal. It cites the expenditure of approximately \$2 million for debt interest on a real estate corporation and transferring \$5 million to the general fund in 1992 and receiving a note for that money, in addition to \$5 million transferred in 1991.

It points to transfers from the MCF to keep it below the \$50 million mark and avoid suspending contributions.

It argues that expenditures for "TWA-Icahn privatization" and a similar expenditure regarding "TWA-Icahn exit" from the MCF did not involve a strike and were illegal.

The Challengers assert that the MCF has been used improperly and is not a chargeable item and that, by precluding the attainment of the \$50 million total by illegal means, it is making an interest free loan to the Union—one precluded by Court decisions.

The Union argues that the MCF has been held to be proper and chargeable as a germane expense applicable to all pilots regardless of their employers because it is intended to protect the entire union. The Union contends it cannot be expected to start each year with a zero balance.

The fourth Circuit in *Crawford v. Air Line Pilots Association*, 992 F.2d., 1295, 143 LRRM 2185, in relevant part, held:

The Court recognized limitations on the union's power to spend exacted fees for bargaining activities unrelated to the bargaining unit: the Constitution bars "a direct donation or interest-free loan to an unrelated bargaining unit for the purpose of promot-

ing employee rights or unionism generally," as well as a "contribution by a local union to its parent" that is "in the nature of a charitable donation." 111 S.Ct. at 1961. Nevertheless, extra-unit bargaining expenditures are legitimate if there is "some indication that the payment is for services that may ultimately enure to the benefit of the members of the local union by virtue of their membership in the parent organization." 111 S.Ct. at 1961-62. Among the expenditures approved by the *Lehnert* Court in this context were funds used to prepare for a potential strike. The Court upheld the district court's findings that such preparations are "reasonable bargaining tools." 111 S.Ct. at 1965.

[1] The holding in *Lehnert*, read in conjunction with the district court's extensive findings of fact, makes the union's case for the challenged expenditures, if anything, stronger than it had been under previous precedent. ALPA's "unified-membership structure," 111 S.Ct. at 1961, is even tighter than that of the union in *Lehnert*. As the district court found, negotiations at other airlines were not only germane to the bargaining process at each airline bargaining unit, but in essence determined the result of the bargaining process. Expenditures to prevent the extraction of concessions from ALPA by individual airlines handily meet the *Lehnert* test. Because support for the striking pilots was of crucial importance in establishing the union's bargaining position in each airline unit, the requirement that agency-fee objectors provide funds for the strike benefits was clearly justified by the bargaining pattern and practice in the airline industry.

## II

[2] Appellants attempt to challenge the use of their fees for the major contingency fund as an "involuntary loan." While the *Lehnert* Court cautioned in

dictum that exacted funds could not be used for an "interest-free loan to an unrelated bargaining unit for the purpose of promoting employee rights or unionism generally," 111 S.Ct. at 1961, the ALPA fund does not match that description. The fund is, in the findings of the district court, "a device reasonably employed to implement the duties of the union as exclusive representative of the employees in the bargaining unit." Like the payments to the national union approved in *Lehnert*, the fund "contributes to the pool of resources potentially available to the local" and thus "is assessed for the bargaining unit's protection, even if it is not actually expended on that unit in any particular membership year." 111 S.Ct. at 1961. Here, the purposes for which the fund was created were, by finding of the district court, germane to collective bargaining. As they were designed to further the union's duty of representation, they were by definition justified by the policies underlying the RLA. Finally, we do not believe that the burden to constitutional rights imposed by permissible exaction of fees is heightened simply because the funds are assessed in advance of labor actions rather than contemporaneously or after wards.

Accordingly, applying the test enunciated by the Court in *Lehnert*, we hold that a pro rata share of strike support benefits for pilots in other bargaining units and of the pro rata cost of the major contingency fund may be charged to objecting agency-fee payers. *Accord Pilots Against Illegal Dues v. Airline Pilots Ass'n*, 938 F.2d 1123, 1131 [137 LRRM 2963] (10th Cir. 1991).

We believe the Court decision in *Crawford*, addressing the same facts that are before us, is dispositive of the broad questions of the right of the Union to collect funds for the MCF as a chargeable expense without reference to

the particular agency fee payer's employment and that the funds need not be spent each year.

Going beyond *Crawford*, we view the expenditures relating to "TWA-Icahn Privatization" as addressing possible bankruptcy or employee purchases to be as related to collective bargaining as a strike fund and to fall within the general area of use permitted in the contingency fund. Additionally, these expenditures were for contingency matters which could affect other carriers and their pilots.

As regards the alleged illegal loan, we find that *Crawford* disposes of that issue and find no impropriety in the MCF based on that allegation. In addition, record testimony indicates that part of the payment to ALPA from the MCF was to repay the Union's expenditures regarding job actions.

We now consider the allegation that the Union has improperly used the MCF to prevent accumulating the \$50 million, which would result in a suspension of collections for the MCF. We find that our charter does not extend to the Union's methods of operations as regards efficiency, whether it borrows money externally or internally. Our role does not address the size of salaries, the luxury of furnishings, whether officers travel first class or coach, the price paid for meals, hotels, cars, etc.

Those issues all belong within the internal relations of the Union and may be addressed by members in their elections, in conventions or in court, if they violate the contract between the member and the Union.

Thus, whether the MCF should put its money in a bank, or loan it to the Union, is not before the undersigned. Similarly, whether the MCF has engaged in creative finances to prevent reaching the \$50 million maximum involves the relationship between the Union and its members who pay the dues. For example, nothing would preclude the Union from changing the amount to \$100 million or

increasing the percentage of salary paid to the MCF. Clearly, these are issues far broader than the amount paid by the non-member agency fee payer. They affect approximately 37,000 members and not just 159 Challengers. Our role is confined to determining whether the expense, regardless of the amount, is germane because it is related to negotiations or the performance of representational functions.

Accordingly, we find that all expenses related to the MCF fund for 1992 are germane and properly charged to non-member agency fee payers.

#### VIII. *Air Safety Expenditures*

The role of the arbitrator is to make a determination of the expenses claimed to be germane and chargeable to agency fee payers. That role is not dependent on whether an issue is raised by any Challenger regarding the expense. It is in that context that the undersigned arbitrator requested additional information relating to expenses involving air safety. Having raised the issue and having requested details for the claims, estimated to exceed \$3 million, the counsel for the Challengers then argued that the safety expenses should not be treated as germane and that they had not been sufficiently explained to justify that allocation.

The Union asserts that safety expenses have never been challenged and that the witness, who testified regarding such expenses, was not cross-examined by Challenger's counsel.

The Union argues that safety is critical to its collective bargaining, grievance processing and day-to-day dealings with the airlines. The expenses involve an Engineering and Air Safety Department and Accident Investigation Department, two of the eleven departments; pilots being assigned to various committees and being reimbursed for lost pay; local and regional air safety committees; central

technical committees consisting of staff and pilots; and experts with knowledge of regulations.

The Union points to collective bargaining provisions dealing with safety involving qualifications of instructors, training time, and rest periods. All of these matters involved knowledge of regulations and technical knowledge of operations, as well as expertise in physiology.

The Union asserts that safety information is relevant in processing grievances. It contends safety information is translated into collective bargaining proposals. It refers specifically to the work of the Airport Standards Committee, Airworthiness Committee, All Weather Flying Committee, Air Traffic Control Committee and the Charting and Instruments Committee (CHIP), as examples of committee's reports that are used in negotiations.

The Union argues that accident investigations and pilot reporting systems provide knowledge for negotiations and representation of its pilots.

In dealing with the role of the Union and its relationship to Federal regulatory agencies and the carriers, the Union noted in part:

In the airline industry, the roles of employer and government are inextricably intertwined on matters of safety. As we have noted, the federal government is intimately involved in setting the standards by which the pilots performance as an employee will be judged. For example, a pilot may refuse to traverse a field in fog because of inadequate signage, mindful of the Detroit accident that was attributed in part to such inadequacies. Should a grievance or violation action ensue, the Airport Standards Committee will be called upon to render technical assistance based upon its knowledge of that and other airports. The results of ALPA's investigation into the Detroit accident will also contribute to its representation in any such grievance. Furthermore, ALPA may work with the com-

pany and the airport to effect improvements. Despite the involvement of the government agency in the original accident investigation and in the setting of standards, the union's work pertains directly to its duties as collective bargaining representative, whether or not a collective bargaining agreement or a successful grievance results. The union speaks to the employer only as a collective bargaining representative, and may engage in a range of discussion, negotiation, and pressure tactics to persuade the employer not to discipline the pilot, to see the problem as the pilot sees it, and to work toward an improvement. That the government may play a role in setting or revising the standard does not limit the union's ability to act as collective bargaining representative any more than the existence of the Fair Labor Standards Act affects a union's right to charge for the negotiation of hours of work.

In regard to its Aircraft Evaluation/Certification Committee and its accident investigations, the Union asserts that, although contracts do not dictate aircraft, the results of the safety information obtained are used in negotiations.

The Union cites *Lehnert* to support charges for safety on the basis that in *Lehnert*, the Supreme Court permitted charges for publishing information of special interest to teachers.

The undersigned is in the position of rendering a decision on expenses that, by their very nature, are most important to all pilots, to the public generally and to the flying public in particular. There is no doubt that the Union's investigation of accidents serves a public good, even if it supplements the Federal government's official investigation. There is no question that committees considering air traffic control procedures, aircraft airworthiness, airport standards, all weather flying, hazardous materials, CHIPS, human performance, aviation weather and ground deicing, among others, which may supplement Federal regulatory studies and efforts and carrier studies and efforts, are most

beneficial to the pilots represented by the Union, as well as all of the public. The Union's role in establishing local, regional, and national air safety groups and in providing a system for pilots to report safety problems, is most desirable as a function of a professional organization and for the public, in general.

The Union's role in Air Safety, as set forth in its "Air Safety Manual", is:

Air Safety is the primary responsibility of every airline pilot and is, therefore, a prime concern of the Air Line Pilots Association. The professional pilot in carrying out this responsibility to his passengers and to the general public knows that this responsibility cannot be delegated to anyone—not to employers, not to federal aviation agencies, nor to any other agency or person.

Furthering air safety is the primary reason for publication of this Manual. It is a compilation of the procedures ALPA has formulated over many years, and it is intended for use as a general informational guide for all ALPA air safety activities.

The evolution of these procedures and the ALPA Air Safety Structure occurred for a simple reason: During the execution of normal duties, aircrews cannot conduct experimentation, system or procedural analyses, or equipment evaluations effectively. These things must be done independently from line flying. Recognizing this need, ALPA provides the Air Safety Structure to enable pilot volunteers to conduct critiques of their operating environment and to report unsafe conditions to proper authorities. To supplement this volunteer activity, the Engineering and Air Safety Department provides continuity and technical expertise.

Airline pilots each day utilize practically every commercial aviation facility in the world and every type

of commercial aircraft component, such as powerplants, navigational equipment, etc. Hence, pilots provide a means for continuous monitoring of all aviation facilities. Routine pilot reporting and special incident reports provide the aviation industry with its greatest source of information to determine what safety problems exist. The Association considers the discovery and reporting of air safety problems to be one of the primary safety functions of the airline pilot. Thus, the main role of the ALPA Air Safety Structure is to provide channels of communication for reporting such problems.

An additional role for the Air Safety Structure is to serve as a stimulus for continued alertness within individuals for the detection of hazards, incidents, or nonstandard practices in daily operations. The role of the pilot as a critic of the system must be maintained, but the critic must be introspective as well. Professionalism and air safety go hand in hand.

A third role for the Air Safety Structure is to participate in the investigation of all air carrier accidents. The responsibility for the discharge of these duties lies with the President's Department through the Director of the Accident Investigation Department and the ALPA Accident Investigation Board, in conjunction with the respective airline pilot group.

This is the ALPA viewpoint and a description of some of ALPA's activities in the field of air safety. The scope of activity is potentially limitless and the problems are myriad. It is a constant challenge to keep this dynamic and rapidly growing industry a safe means of transportation and to fulfill the pilots' primary responsibility for the maximum degree of safety.

The Union's Assistant Director in the Representation Department, who has been involved in the administration

of collective bargaining agreements, testified, in relevant part, as follows:

In the broader sense, though, you know we represent pilots before the FAA in enforcement actions arising out of aircraft accidents, so obviously the information gained from the accidents is of great significance in terms of our representation of the pilot's interest in general, and trying to make out the best body of law possible on behalf of pilots, as those cases develop. With regard to other things to be learned from the aircraft accidents, in the broader sense of collective bargaining being deliberations, discussions with management, with a view toward shaping the operation that's not necessarily reflected in the collective bargaining agreement, as an Association we do that all the time through our safety structure and even through the folks in my department as well, and we meet with management, we meet with the FAA, and we try to implement, have implemented safer procedures which are not necessarily involved or embodied in the collective bargaining agreement. And, that is one of our representative functions, no doubt, the people in the accident investigation and the engineering air safety side, and the committee people who work on those technical committees spend a lot of their time doing that.

Now, does each and every one of their suggestions or recommendations get embodied in the collective bargaining agreement, absolutely not, but do they get embodied in changed procedures, or influence changes in the FARs, absolutely yes.

\* \* \* \*

Now economic analysis is much more targeted, it's a very specific support function for the collective bargaining process. But, the safety side deals with how pilots conduct their job, only some of which we really bargain about at the bargaining table. A lot

of it we are dealing with the carrier, in terms of their operating policies and procedures, and with the FAA in terms of their operating policies, procedures and standards, which are not necessarily embodied precisely in the collective bargaining agreement. I think I tried to say that before, that if you look at collective bargaining in a narrow sense, as what's happening right at the bargaining table, well then, you know, some of what we get from the air safety we don't use in that sense. But, if you look in the broader sense, in terms of how a pilot conducts the professional side of his life, not his personal pecuniary interests, wages and expenses and that kind of stuff, but how he conducts his professional life, how he flies safely from A to B, how he operates the aircraft in the environment, that kind of stuff, then we draw on that from the air safety structure.

Based on the record before us, we are satisfied that there is sufficient relationship between accident investigation and the representation of pilots in grievances, in existence or potentially arising, to be a chargeable item to agency fee payers. It follows that the expenses of the Accident Investigation Department are chargeable to fair share payers as germane.

We also find that the existence of a national clearing house for air safety and medical issues relating to pilot and carrier relations involving negotiations and contract administration to warrant a finding that the central air safety and medical expenses are germane expenses.

The evidence does not establish any direct linkage between contract negotiation or contract administration and the functions of various committees involved in air safety. Thus, we must determine whether these expenses, which are unique to this professional association/labor organization, fall within the category of chargeable expenses not directly related to representational duties.

In the only case addressing similar expenses, *Lehnert v. Ferris Faculty*, 500 U.S. 503 (1991), the Court ad-

ressed the Union's use of its publication to inform teachers on matters of concern to teachers, education generally, professional development, job opportunities, and related matters. The Court held,

Informational support services such as these are neither political nor public in nature. Although they do not directly concern the members of petitioners' bargaining unit, these expenditures are for the benefit of all and we discern no additional infringement of First Amendment rights that they might occasion. In short, we agree with the Court of Appeals that these expenses are comparable to the *de minimis* social activity charges approved in *Ellis*. See 466 U.S., at 456.

In a related area, the Court in *Lehnert* stated:

#### E

The Court of Appeals rules that the union could use the fees of objecting employees to send FFA delegates to MEA and the NEA conventions and to participate in the 13E Coordinating Council, another union structure. Petitioners challenge that determination and argue that, unlike the national convention expenses found to be chargeable to dissenters in *Ellis*, the meeting at issue here were those of affiliated parent unions rather than the local, and therefore do not relate exclusively to petitioners' unit.

We need not determine whether petitioners could be commanded to support all the expenses of these conventions. The question before the Court is simply whether the unions may constitutionally require petitioners to subsidize the participation in these events of delegates from the local. We hold that they may. That the conventions were not solely devoted to the activities of the FFA does not prevent the unions from requiring petitioners' support. We conclude above that the First Amendment does not require so close a connection. Moreover, participation by mem-

bers of the local in the formal activities of the parent is likely to be an important benefit of affiliation. This conclusion is supported by the District Court's description of the 13E Coordinating Council meeting as an event at which "bargaining strategies and representational policies are developed for the UniServ unit composed of the Ferris State College and Central Michigan University bargaining units." 643 F. Supp., at 1326. As was held in *Ellis*, "[co]ventions such as those at issue here are normal events . . . and seem to us to be essential to the union's discharge of its duties as bargaining agent." 466 U.S., at 448-449.

The principle involved in fair share fee payers being charged certain expenses and not other expenses is clearly set forth in *Lehnert* as follows:

This is not our first opportunity to consider the constitutional dimensions of union-security provisions such as the agency-shop agreement at issue here. The Court first addressed the question in *Railway Employees v. Hanson*, 351 U.S. 225 (1956), where it recognized the validity of a "union shop" agreement authorized by § 2, Eleventh, of the Railway Labor Act (RLA) as amended, 64 Stat. 1238, 45 U.S.C. § 152, Eleventh, as applied to private employees. As with the Michigan statute we consider today, the RLA provision at issue in *Hanson* was permissive in nature. It was more expansive than the Michigan Act, however, because the challenged RLA provision authorized an agreement that compelled union membership, rather than simply the payment of a service fee by a nonmember employee. Finding that the concomitants of compulsory union membership authorized by the RLA extended only to financial support of the union in its collective bargaining activities, the Court determined that the challenged arrangement did not offend First or Fifth Amendment values. It cautioned, however: "If

'assessments' are in fact imposed for purposes not germane to collective bargaining, a different problem would be presented." 351 U.S. at 235 (footnote omitted). It further emphasized that the Court's approval of the statutorily sanctioned agreement did not extend to cases in which compelled membership is used "as a cover for forcing ideological conformity or other action in contravention of the First Amendment." *Id.*, at 238.

*Hanson* did not directly concern the extent to which union dues collected under a governmentally authorized union-shop agreement may be utilized in support of ideological causes or political campaigns to which reluctant union members are opposed. The Court addressed that issue under the RLA in *Machinists v. Street*, 367 U.S. 740 (1961). Unlike *Hanson*, the record in *Street* was replete with detailed information and specific factual findings that the union dues of dissenting employees had been used for political purposes. Recognizing that, in enacting § 2, Eleventh, of the RLA, Congress sought to protect the expressive freedom of dissenting employees while promoting collective representation, the *Street* Court construed the RLA to deny unions the authority to expend dissenters' funds in support of political causes to which those employees objected.

Two years later in *Railway Clerks v. Allen*, 373 U.S. 113 (1963), another FRLA case, the Court reaffirmed that holding. It emphasized the important distinction between a union's political expenditures and "those germane to collective bargaining," with only the latter being properly chargeable to dissenting employees under the statute.

Although they are cases of statutory construction, *Street* and *Allen* are instructive in delineating the bounds of the First Amendment in this area as well. Because the Court expressly has interpreted the FRLA "to avoid serious doubt of [the statute's] con-

stitutionality," *Street*, 367 U.S., at 74e9, see *Ellis v. Railway Clerks*, 466 U.S. 435, 444 (1984), the RLA cases necessarily provide some guidance regarding what the First Amendment will countenance in the realm of union support of political activities through mandatory assessments. Specifically, those cases make clear that expenses that are relevant or "germane" to the collective bargaining functions of the union generally will be constitutionally chargeable to dissenting employees.

They further establish that, at least in the private sector, those functions do not include political or ideological activities.

It was not until the decision in *Abood* that this Court addressed the constitutionality of union-security provisions in the public-employment context. There, the Court upheld the same Michigan statute which is before us today against a facial First Amendment challenge. At the same time, it determined that the claim that a union has utilized an individual agency-shop agreement to force dissenting employees to subsidize ideological activities could establish, upon a proper showing, a First Amendment violation. In so doing, the Court set out several important propositions:

First, it recognized that "[t]o compel employees financially to support their collective bargaining representative has an impact upon their First Amendment interests." 431 U.S. at 222. Unions traditionally have aligned themselves with a wide range of social, political, and ideological viewpoints, any number of which might bring vigorous disapproval from individual employees. To force employees to contribute, albeit indirectly, to the promotion of such positions implicates core First Amendment concerns. See, e.g., *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) ("[T]he right of freedom of thought protected by the First Amendment against state action includes

both the right to speak freely and the right to refrain from speaking at all").

Second, the Court in *Abood* determined that, as in the private sector, compulsory affiliation with, or monetary support of, a public-employment union does not, without more, violate the First Amendment rights of public employees. Similarly, an employee's free speech rights are not unconstitutionally burdened because the employee opposes positions taken by a union in its capacity as collective bargaining representative.

\* \* \* \*

In *Ellis v. Brotherhood of Railway, Airline, and Steamship*, 466 U.S. 435 (1984), the Supreme Court, addressing matters under the same statute that controls this Union, stated, in relevant part:

5. There is no First Amendment barrier with regard to the three challenged activities for which the statute allows the union to use petitioners' contributions. The significant interference with First Amendment rights resulting from allowing the union shop is justified by the governmental interest in industrial peace. Forced contributions for union social affairs do not increase the infringement of the employee's First Amendment rights. And while both union publications and conventions have direct communicative content, there is little additional infringement of First Amendment rights, and none that is not justified by the governmental interests behind the union shop itself.

Thus, the major concern in determining whether a non-member may be charged for an expense incurred by the Union is whether that expenditure, considering the purpose behind a fair share arrangement, imposed a "significant interference with First Amendment rights." We have carefully considered the nature of safety expenditures, as noted above, and cannot find any ideological characteristic to those expenditures so that *any non-member* can object

to those activities on constitutional grounds. They are not organizational activities which may be opposed by those against unionization. It does not involve expenditures that have a political purpose, such as lobbying. The safety activities do not deal with racial issues which may be opposed by some non-member.

We do not believe that the following Court's statement in *Lehnert* warrants a different view. The Court stated:

The Court of Appeals determined that the union constitutionally could charge petitioners for certain public-relations expenditures. In this connection, the court said: "Public relations expenditures designed to enhance the reputation of the teaching profession . . . are, in our opinion, sufficiently related to the unions' duty to represent bargaining unit employees effectively so as to be chargeable to dissenters." 881 F.2d at 1394. We disagree. Like the challenged lobbying conduct,

In *Lehnert*, the Court found the public relations activities could be viewed as political in nature. We find no basis to conclude that ALPA's safety expenditures are political. We do not view input into FAA regulations as political in the accepted context of that phrase.

Despite the fact that no Court has dealt with the matter of safety issues, we find that, based on the Court decisions set forth above and the rationale in those decisions, the Union's expenditures for safety committees and safety activities involving various problems faced by the pilot represented by ALPA, are properly charged as a germane expense.

#### IX. IFALPA and ITW Contributions

The Union made a per capita payment to the International Federation of Air Line Pilots Association (IFALPA) in the amount of \$680,686.24 during 1992.

It also made a payment to the International Transport Workers (ITW) in the amount of \$31,087.80.

IFALPA's literature states its operations and purpose as follows:

Internally, the Federation develops and constantly updates an international pilots viewpoint on all matters impacting upon the profession and affecting generally the safety of air transport operations. It achieves this through the work of a number of specialist Committees, all comprised of active airline pilots. In this way, it may be said that IFALPA Speaks For Pilots.

The Federation maintains detailed policy manuals which serve as briefs for IFALPA representatives attending meetings throughout the world at which decisions affecting industry standards may be taken. These representatives are all active airline pilots and in this way Pilots Speak For IFALPA.

In particular, IFALPA interacts with other major aviation bodies such as ICAO, the Airports Council International (ACI), the International Air Transport Association (IATA), the Flight Safety Foundation (FSF), the Society of Automotive Engineers (SAE), and the International Federation of Air Traffic Controllers Associations (IFATCA). It presses both for the adoption of international standards and their implementation at national level.

Within the Federation, a forum exists for exchanging information and ideas among pilots, and for fostering goodwill and comradeship within the profession. A comprehensive range of mutual assistance policies is in place, which *inter alia* provides for assistance to pilots involved in legal, accident- or security-related problems abroad and a corps of IFALPA accredited accident investigators is on hand to assist local Member Associations in providing pilot input to the investigation of accidents occurring in their territories.

The ITW is interested in international air safety oversight.

Because we have no knowledge as to how either organization spends its monies and whether any expenditures are made for causes opposed by the non-member agency fee payer, we shall exclude both amounts as chargeable germane expenses.

#### X. Publications

The Union's testimony indicates that 45% of its cost of issuing publications were found to be nongermane based on a review of lines and pages in all publications.

We have reviewed sample publications and find no basis to conclude that this figure, one of many charges subject to an outside audit, are other than correct and reasonable. For example, in the August 1992 publication "Air Line Pilot", there was a two-page article on the Union label and a small part of one page regarding support for the ALPA-PAC in a magazine of 65 pages. The magazine dealt with matters of interest to the pilots as professionals, safety and reports regarding the Union's performance of its representational role.

Since the cost of actual publications were allocated on the basis that 45% is nongermane, we must conclude that other costs associated with publicity, in general, should similarly be allocated so as to exclude 45% to non-member agency fee payers. Thus, the following items carried as germane expenses shall be reallocated on the formula of 45% nongermane to 55% germane.

Newsletter Editors-Services in the amount of \$13,523.65 was not so allocated and should be. Thus, \$6,085 should be subtracted from the germane expenses chargeable to agency fee payers.

The review of the record reveals that telephone, computer usage, and taxes were split between germane and nongermane involving publications, as well as organizing, lobbying and charity viewed as nongermane.

The evidence reveals that items listed as printing costs are linked to negotiations and not publications or public

information. Accordingly, on the record before us, we are satisfied that the general charges for printing the various publications, document processing, related computer and telephone charges have been allocated so as to exclude nongermane publication costs.

#### XI. Litigation

The Union has excluded from germane charges such litigation expenses as are assigned to specific cases not directly affecting the instant Challengers. Most of these expenses involved outside counsel and are listed in the SGNE under Litigation. The total amount excluded from expenses payable by agency fee payers was \$8,334,236.

This exclusion of litigation, not directly related to the unit, does not ban the expenses of operating a legal department to perform the functions related to negotiations, contract administration, and other representational functions. Thus, expenses of the legal department, including rent and support services, are chargeable. As the Court stated in *Ellis*:

5. *Litigation.* The expenses of litigation incident to negotiating and administering the contract or to settling grievances and disputes arising in the bargaining unit are clearly chargeable to petitioners as a normal incident of the duties of the exclusive representative. The same is true of fair representation litigation arising within the unit, or jurisdictional disputes with other unions, and of any other litigation before agencies or in the courts that concerns bargaining unit employees and is normally conducted by the exclusive representative.

#### XII. Rent

Testimony indicates that rent charges, including utilities, are allocated by project which are then separated into germane and nongermane expenses. Thus, we find no basis to disagree with charges under general administration

or union administration in Appendix B 1 and 2 regarding such allocations.

### XIII. *Government Affairs*

The Union maintains a Government Affairs Department consisting of 10 employees. That office, per the evidence, is involved in lobbying and some general activities not involving lobbying. The record indicates that \$903,247 has been charged as nongermane legislative activities.

We are unable to determine what, if any, additional expenses were incurred by that department. The record indicates some unspecified amount of expenses of the Government Affairs Department were charged as germane because they involved attending staff meetings, general administration and training.

In our view, *all* expenses of a unit that performs lobbying are nongermane where they involve hiring, directing, supporting and reporting on lobbying and legislation. Accordingly, the Union is directed to identify expenses of the Government Affairs unit and change any germane charges to nongermane charges and to adjust the total of all charges to agency fee payers to reflect those changes.

### XIV. *General Expenses*

Expenses of maintaining the Union's existence, of having officers and employees perform chargeable representational functions, performing those functions involved in housing and operating the Union as an institution, have been held to be chargeable as germane expenses.

The Supreme Court in *Lehnert* stated:

Petitioners' contention that they may be charged only for those collective bargaining activities undertaken directly on behalf of their unit presents a closer question. While we consistently have looked to whether non-ideological expenses are "germane to collective

bargaining", *Hanson*, 351 U.S., at 235, we have never interpreted that test to require a direct relationship between the expense at issue and some tangible benefit to the dissenters' bargaining unit.

The court recognized as much in *Ellis*. There it construed the RLA to allow the use of dissenters' funds to help defray the costs of the respondent union's national conventions. It reasoned that "if a union is to perform its statutory functions, it must maintain its corporate or associational existence, must elect officers to manage and carry on its affairs, and may consult its members about overall bargaining goals and policy." 466 U.S. at 448. We see no reason why analogous public-sector union activities should be treated differently.

Assuming that some officers or employees devote some small amount of their time to lobbying or other management activities, the record before us establishes that the space, the facilities, and the time used are for germane activities. It has been recognized that an exact accounting of expenses for germane purpose chargeable to agency fee payers is not to be expected.

The use of general funds to operate the union as an institution was also noted in a footnote in *Machinists v. Street*, 367 U.S. 740, when the Court noted:

In *Detroit Mailers* the Board explained. "Neither on its face nor in the congressional purpose behind [Section 8(a)(3)] can any warrant be found for making any distinction here between dues which may be allocated for collective-bargaining purposes and those earmarked for institutional expenses of the Union. [D]ues collected from members may be used for a variety of purposes, in addition to meeting the Union's cost of collective bargaining. Unions rather typically use their membership dues to do those things which the members authorized the Union to do in their interest and on their behalf."

Based on the above, we find that the expenses listed under General Administration and Union Administration meet the tests of being designed to operate the Union as an institution as intended by its members and does not involve lobbying or organizing, which have been excluded. These expenses, consisting of salaries and other expenses of officers and employees and costs of facilities and equipment, meet the test in *Lehnert* that:

chargeable activities must (1) be "germane to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding "free riders"; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.

#### XV. *Delta Challengers*

The Challengers, the vast majority of whom are Delta Airline pilots, argue that they should be charged only expenses related to the negotiation of the Delta contract and cost of servicing that contract.

For the reasons set forth above, we find that ALPA, operates as a unified Union where each contract has some affect on all carriers, albeit not a direct measurable impact, and that thereforer no basis exists for establishing a unit by unit system of charges. No case supports the Challengers' contention that they be charged only expenses *directly* related to and germane to Delta's contract. We, accordingly, reject that request and all arguments linked to that assertion.

#### AWARD

Based on the evidence, the parties' positions and the discussion set forth above, the undersigned makes the following Award:

1. The Air Line Pilots Association (ALPA) computation of germane and nongermane expenses for the purpose of determining the amount of fees payable by agency fee

payers for 1992 is found supported by the evidence and applicable Court decisions.

2. The amount is as set forth in Appendix B, which is to be reduced by subtracting from germane expenses, other than the MCF charges, the following expenses:

a. Payments to International Federation of Air Line Pilots Association (IFALPA) in the amount of \$680,686.24;

b. Payments to International Transport Workers (ITW) in the amount of \$31,087.80;

c. Charges for Newsletter Editor Services in the amount of \$6,085; and

d. All charges of Department of Government Affairs.

3. All charges for germane expenses are chargeable to all non-member agency fee Challengers regardless of the identity of their employing carrier.

4. Charges for the Major Contingency Fund (MCF) are proper and are all chargeable to non-member agency fee Challengers regardless of their employing carrier.

5. In agency fee chargeable to non-members shall be modified to reflect the changes set forth in paragraph 2 above.

6. The Challengers, who are proper parties to this proceeding, are those listed in Appendix A attached.

7. The undersigned will retain jurisdiction for thirty (30) days for the sole purpose of correcting any arithmetic errors or names in Appendix A and to approve the revised amount of the germane expenses chargeable to agency fee Challengers.

Original dated August 10, 1994

Amended September 30, 1994

/s/ Louis Aronin  
LOUIS ARONIN

## APPENDIX A.

## LIST OF CHALLENGERS

Included in

AAA Case No. 16-673-00277-93DS

Abbott, Ted M.	Ehmer, James S.
Anderson, Clarence A.	Elder, Joseph M.
Anderson, J. Eric	Elin, Richard A.
Archer, Gregg B.	Elmore, Jerry O.
Armstrong, Jim	Elmquist, Bruce E.
Asay, Donald E.	Engel, Robert D.
Baitis, Walter W.	Etter, George W.
Banks, Richard A.	Ferdinand, George
Barnes, R. B.	Fletcher, Ferdinand E.
Bauer, David	Fossum, Neil B.
Betts, Earl P.	Fow, G. Ray
Bilskie, R. P.	Franks, Stanley K.
Blake, Allan G.	Fuller, Dell
Boline, Laurel F.	Gaines, Alan L.
Boschetto, Dale M.	Gebo, Gary
Boyce, Allen W.	Gibbons, James A.
Brinton, David L.	Glazier, Patrick
Brittenham, John C.	Gravino, Nicholas
Brushwyler, Robert	Greulich, Dennis E.
Buck, Peter	Guilliat, Gary L.
Burgess, Jerald C.	Haedrich, Bruce W.
Burson, G. D.	Haines, George S.
Byrne, Charles R.	Halloway, Benjamin F.
Cecka, Robert J.	Hannan, Michael T.
Chamberlin, Alvin W.	Harper, Jack N.
Cinotto, Gary R.	Harper, Douglas R.
Cody, Harold J.	Harrison, John C.
Coley, George S.	Hayden, Harvey L.
Cook, William J.	Hector, George
Crayton, III, J. J.	Heinz, Jr., Howard C.
Cumming, R. E.	Hobbs, Robert W.
Cutter, Jr., G. R.	Ice, Jr., Willard F.
Dennis, Guy	Ideker, Jr., Lester H.
Develis, Joseph A.	Inderrieder, R. L.
Dhamer, Robert T.	Insogna, Dominic M.
Doiron, W. David	Jackson, Jr., Rollin A.
Ehmann, P. J.	Jacobs, Paul C.

Jenkins, John P.	Rogers, L. A.
Jones, George P.	Rogers, Gordon G.
Jones, W. Larry	Rose, Gregory J.
Kinard, Samuel R.	Rowe, John D.
Kozimer, Kenneth G.	Roy, Allan H.
Lacroix, Jr., Edward W.	Scheinblum, Roberto P.
Little, Frank R.	Schwartz, James L.
Lynch, John L.	Shackelford, Kenneth L.
Lyon, David E.	Sharp, John M.
Martin, Frank C.	Shaughnessey, Kevin
Massey, Donald E.	Sherman, Craig A.
McGaw, William A.	Simmons, Gary D.
McGibney, Michael D.	Smit, Henricus V.
McHargue, Gary R.	Smith, Minor A.
McKinstry, Thomas	Stookey, Murray V.
McNeil, Dane W.	Stuppy, II, Laurence
McNeil, Charles H.	Sullivan, Steven B.
Miller, Charles R.	Taylor, Larry J.
Miller, Dale E.	Taylor, Frank
Miller, Robert A.	Tebay, Richard
Mogensen, E. J.	Thompson, John S.
Monroe, Robert Sean	Thompson, John A.
Morin, Ronald A.	Thorn, Don L.
Morrow, C. Richard	Tichacek, Richard
Munton, James W.	Tidwell, James A.
Naber, David G.	Tonnesen, Roger J.
O'Brien, Jr., Robert M.	Uselmann, Edwin D.
Paulsen, Paul E.	Vance, Frederick B.
Pedrazzini, Donald	Vanderhorst, Thomas J.
Peel, Dale F.	Villaume, Mark L.
Peterson, Larry W.	Waldron, Denis F.
Phillips, John B.	Walker, Gerald H.
Pierce, Richard S.	Warner, Robert W.
Pierce, Robert A.	Waterman, George B.
Pittman, James R.	Watson, Neal C.
Prentke, Lawrence A.	Weast, Don
Pupich, George S.	Wolf, Jr., Howard C.
Radula, R.	Wucik, Edward J.
Rector, John C.	Wysong, Henry Y.
Reed, David L.	Young, W. Bruce
Riebow, Jr., Robert L.	Ziminsky, Robert V.
Robinson, Jr., Charles E.	Zink, W.

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**AIR LINE PILOTS ASSOCIATION  
REPORT AND STATEMENT OF  
GERMANE AND NONGERMANE EXPENSES**

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[Logo]

**REPORT OF INDEPENDENT ACCOUNTANTS**

June 14, 1993

To the Board of Directors and Pilots Represented by the  
Air Line Pilots Association

We have audited the accompanying statement of germane and nongermane expenses of Air Line Pilots Association for the year ended December 31, 1992. This statement is the responsibility of the Association's management; our responsibility is to express an opinion on this statement based on our audit. We conducted our audit in accordance with generally accepted auditing standards which require that we plan and perform the audit to obtain reasonable assurance about whether this statement is free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements, assessing the accounting principles used and significant estimates made by management and evaluating the overall financial statement presentation. We believe that our audit provides a reasonable basis for the opinion expressed below.

We have been informed by management that the Association bases the determination of germane and nongermane expenses for the calculation of its refunds on the definitions, significant factors and assumptions described in Note 3.

In our opinion, the aforementioned statements presents fairly, in all material respects, the germane and non-

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germane expenses of the Air Line Pilots Association for the year ended December 31, 1992 based on the definitions, significant factors, and management assumptions referred to above.

This report is intended solely for the information and use of the Board of Directors and pilots represented by the Air Line Pilots Association and should not be used for any other purposes.

/s/ Price Waterhouse  
PRICE WATERHOUSE

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AIR LINE PILOTS ASSOCIATION  
STATEMENT OF GERMANE AND  
NONGERMANE EXPENSES  
FOR THE YEAR ENDED DECEMBER 31, 1992

## Germane expenses:

Negotiations	\$29,808,426	
Grievances	3,164,603	
Union administration	8,947,343	
General administration	13,639,425	
	<u>55,559,797</u>	<u>81.00%</u>

## Nongermane expenses:

Litigation	\$ 8,334,236	
Organization	1,160,688	
Charitable	122,966	
Insurance	663,352	
Legislative	903,247	
Publications	1,639,914	
AFL-CIO	211,128	
	<u>13,035,531</u>	<u>19.00%</u>

Total expenses	<u>\$68,595,328</u>	<u>100.00%</u>
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The accompanying notes are an integral part of the  
Statement of Germane and Nongermane Expenses.

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AIR LINE PILOTS ASSOCIATION  
NOTES TO THE STATEMENT  
OF GERMANE AND NONGERMANE EXPENSES  
FOR THE YEAR ENDED DECEMBER 31, 1992

## NOTE 1—ORGANIZATION AND HISTORY

The Air Line Pilots Association (the Association) is a non-profit unincorporated association organized to promote the interests of the air line pilot profession and to safeguard the rights, individually and collectively, of its members. The Association is exempt from payment of federal and state income taxes under Section 501(c)(5) of the Internal Revenue Code and state statutes, respectively, with the exception of income derived from unrelated business sources, principally advertising and subscription income related to its publication "Air Line Pilot".

In 1970, the Association formed The 1625 Massachusetts Avenue, N.W. Corporation (the Corporation) which owns and operates various land and buildings which are occupied by the Association and other tenants. The Corporation is exempt from payment of federal and state income taxes under Section 501(c)(2) of the Internal Revenue Code and state statutes, respectively, with the exception of income derived from unrelated business sources, principally rental income from real property. (Note 2).

Kitty Hawk Insurance Company, Ltd. (Kitty Hawk) was incorporated under the laws of Bermuda on October 15, 1991 to underwrite the pension fiduciary liability of its parent, the Association, as it pertains to the Association, its members who serve as the Association's authorized representatives, and the Association staff members who perform certain support functions in this area.

## NOTE 2—SIGNIFICANT ACCOUNTING POLICIES AND EXPENSE RECOGNITION

The expenses of the Corporation and Kitty Hawk are not included in the statement of germane and nongermane expenses.

### *Basis of Accounting*

The Association records expenses on the accrual basis of accounting in accordance with generally accepted accounting principles. The total expenses reflected in the statement of germane and nongermane expenses are based on the expenses of the Association; and modified as discussed above and below.

### *Project Expenditures*

The Association's accounting system includes a system of "functional" accounts, known as project codes, which allow the Association to track costs by the projects for which they are incurred. The accounting system records every expense by both natural cost category and by project code. Each project code captures activities and expenses that have a common purpose or goal.

Employee wage and benefit costs are allocated to specific projects, based upon contemporaneous time records. Rental expenses are allocated to project codes as well, based upon the actual square footage occupied for those projects. Each of these projects is reviewed and allocated to a germane or nongermane category based on the nature of the expense.

### *Biennial Convention*

Costs of the Association's biennial conventions are provided for monthly based on management's estimate of the actual costs.

### *Depreciation and Amortization*

Depreciation is computed using the straight-line method over the estimated useful lives of the assets (25 to 40 years for buildings and improvements and 3 to 10 years for furniture and equipment). Leasehold improvements are amortized over the terms of the related leases.

### *Income Taxes*

The Association is subject to federal and state income taxes on its unrelated business income. The Association files a consolidated federal income tax return with its wholly-owned subsidiary, the Corporation. During 1992, the Association incurred net losses from unrelated business activities on a consolidated basis aggregating approximately \$135,000. At December 31, 1992, the Association had net operating loss carryforwards aggregating approximately \$2,154,000 available to offset taxable income through 2006.

### *Pension Plans*

The Association sponsors deferred tax savings plans and an unqualified defined benefit pension plan to eligible employees. Under the deferred tax savings plans, the Association matches employee contributions \$2 for each \$1 contributed up to a maximum of 10% of the covered pre-tax compensation for participating employees. During 1992, the Association recognized \$620,000 and \$1,983,000 in expense related to the pension and deferred tax savings plans, respectively.

### *Commitments and Contingencies*

The Association leases office space in various cities for use as field offices and certain equipment primarily for data processing services. Under certain rental agreements the Association pays a portion of the personal property taxes and any increases in operating expenses in addition to

rental payments. As of December 31, 1992, future minimum lease payments required under operating leases for the next five years which have initial or remaining non-cancelable lease terms in excess of one year are as follows: 1993, \$1,145,000; 1994, \$849,000; 1995, \$311,000; 1996, \$345,000; 1997, \$313,000. Rent expense on a consolidated basis aggregated approximately \$899,000 in 1992.

#### *Related Party Transactions*

The Association leases office space for its Herndon, VA, Washington, D.C. and certain field office locations from the Corporation. Rent expense for these locations totalled approximately \$1,432,000 in 1992.

In 1990, the Executive Board resolved that the Major Contingency Fund (the MCF) would pay the Corporation's interest on the debt secured by the Herndon and Washington properties. In return, the excess of revenue over expenses (after approved reserves) generated by the Washington property is transferred to the MCF as an offset to the interest payments. The net MCF transfers to the Corporation, which is included as an MCF expense, totalled \$508,807 in 1992.

Insurance premiums paid to King Hawk to underwrite the Association's pension fiduciary liability totalled approximately \$100,000 in 1992.

#### *Litigation*

At December 31, 1992, there were several legal actions against the Association in various stages of pre-trial, trial and appeal proceedings. In the opinion of management, based on available information, the Association has meritorious defenses to certain of the actions. In addition, due to the preliminary status of some of the litigation, it is not presently possible for management or legal counsel to foresee the ultimate resolution of all the pending litigation.

However, none of the cases under litigation are expected, by management (including in-house legal counsel), to have a material impact on the consolidated financial statements of the Association.

#### *Other Postretirement Benefits*

The Association provides health care benefits for currently retired employees. Currently, these costs are recognized as an expense on a "pay-as-you-go" basis. During 1992, the Association recognized \$600,000 in expense for those benefits.

Management had previously anticipated the cost of retiree health benefits. An actuarial valuation is being performed to estimate the costs of the liability associated with these benefits. Additionally, although management had begun funding the costs of the liability in December 1988, they are currently developing a funding policy to be commensurate with the results of the actuarial valuation.

In December 1990 the Financial Accounting Standards Board (FASB) issued Statement of Financial Accounting Standards No. 106 (Statement), "Employers' Accounting for Postretirement Benefits Other Than Pensions" which requires these costs to be expensed over the employees' service period on an actuarially determined basis. Adoption of the Statement is required for the Association's 1995 financial statements. Management is currently reviewing its impact on the Association's financial condition and will adopt the Statement when required.

#### *Major Contingency Fund*

The Major Contingency Fund (the MCF) is a designated fund established to provide funds to treat issues of urgent concern that could significantly or adversely affect the airline piloting profession, and which cannot be funded by normal Association budget practices and policies. Expenditures must be authorized by two-thirds of the Execu-

tive Board. Such expenses are treated as germane or non-germane on the same basis as all other Association expenses.

**NOTE 3—MANAGEMENT DEFINITIONS, SIGNIFICANT FACTORS AND ASSUMPTIONS USED IN THE CATEGORIZATION OF EXPENSES AS GERMANE AND NONGERMANE**

*Germane Expenses*

Under law, individuals who are not members of a union but who are nevertheless compelled to pay union dues or fees under an agency shop are entitled to object to sharing the cost of any union activities not germane to collective bargaining. Such individuals are entitled to a pro rata adjustment for any expenditures that are not germane. Union expenses are considered "germane to collective bargaining" if they are (1) germane to collective bargaining activity, (2) justified by the government's policy interest of promoting labor peace and avoiding "free riders," and (3) not an additional burden on freedom of speech. Included among these costs are expenses incurred in connection with the negotiation and administration of collective bargaining agreements, the filing and processing of grievances and arbitration of disputes arising from those agreements, leadership training, and the costs incurred in maintaining the Association as an administrative organization. The specific expenses included in this category are described as follows:

*Negotiations*

This designation includes the costs of negotiating agreements with member airlines. Included are major mid-term negotiations, such as occurred at Delta and Northwest; normal mid-term negotiations such as occurred at United; and formal Section 6 contract negotiations. Virtually all represented airlines en-

gaged in one or more of these types of negotiations during 1992. Section 6 negotiations were commenced, continued, or completed during 1992 with Allegheny Commuter Airlines, Air Midwest, Atlantic Southeast Airlines, Atlantic Coast Airlines, Business Express, ComAir, DHL Airways, Henson Airways, Mesaba, Reeve Aleutian Airlines, Ross Aviation, Simmons Airlines, States West, Trans World Airways, Trans World Express, and US Air. Negotiation costs include those incurred by the ALPA Negotiating Committee and other officials in the course of meeting, preparing for and conducting negotiations, communicating with pilot groups before and throughout negotiations, and conducting continuing meetings with management representatives to address new issues and resolve disputes as they arise. The expenses of the Association's Local Councils, Master Executive Councils, and national governing bodies are also included here, since most of their meetings are devoted to collective bargaining issues. The Association's aviation safety-related expenses, closely related to its negotiations, are included as well in this category.

*Grievances*

Expenses associated with processing grievances and System Board and Retirement Board proceedings to resolve disputes arising under collective bargaining agreements are captured in this category.

*Union Administration*

Union Administration costs are those expenses associated with maintaining the Association's institutional structure as a labor union, and include the costs arising from the democratic process. Expenses include flight pay loss and expenses for the Association's national officers (other than the President), voting and balloting costs, dues billing and collection, and maintenance of agency shop agreements.

### *General Administration*

This category captures general overhead and administrative expenses associated with maintaining and staffing offices throughout the country. Insurance costs, the President's salary, and the costs of the Association's administrative department and accounting and reporting functions are included in this category.

### *Nongermane Expenses*

Nongermane expenses include the costs of activities not directly related to collective bargaining. Included among these costs are expenses incurred in helping pilot groups to organize themselves, lobbying and political activities, and some public relations and litigation expenses. The specific expenses included in this category are described as follows:

#### *Litigation*

The Association interprets recent court cases to allow the treatment of most of its litigation as germane and and chargeable, at a minimum, to the pilots employed by the airline or airlines affected by the litigation. However, administrative considerations make such an allocation impractical at this time. For purposes of this report, the Association has chosen to treat such litigation as nongermane.

#### *Organizing*

The expenses of the Association's assistance to employees interested in organizing themselves for collective bargaining purposes are treated as wholly nongermane.

### *Charitable*

The Association's charitable activities include contributions to the United Way, administration and funding of a college scholarship program, and support for a reward program to apprehend terrorists.

### *Insurance*

The Association administers several insurance programs for active and retired members and their families. That portion of the premiums that is retained by the Association as a fee for administering the programs has been offset against the total cost of providing the insurance, and the net cost is treated as nongermane.

### *Legislative*

All expenses identified with legislative activity have been treated as nongermane.

### *Publications*

Forty-five percent of the net cost of Air Line Pilot Magazine, after considering subscription and advertising revenue, is treated as nongermane to collective bargaining to reflect the ratio of germane to nongermane materials in the magazine and the Association's other publications. The remaining 55% of expenses is captured in the Negotiations category. The costs of Master Executive and Local Council newsletters are also allocated between Negotiations, a germane category, and Publications, a nongermane category, on the same basis.

Media and public relations expenditures have been included in this category as well.

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*Affiliation fee*

The Association's annual per capita payment to the AFL-CIO is treated as nongermane.

#### NOTE 4—RECONCILIATION TO AUDITED FINANCIAL STATEMENTS

The Association's total expenses for the year ended December 31, 1992 were \$69,623,139, as reported in its audited financial statements. Because the expenses subject to rebate were reduced by the advertising and subscription income received from the Air Line Pilot magazine and revenue from the Association's insurance programs, the total expenses must be reduced accordingly. The adjusted expenses subject to rebate are reconciled to the audited financial statements as follows:

Total Association expenses per audited financial statements	\$69,623,139
Less: Advertising and Subscription Revenue	(1,052,491)
Less: Insurance Program Revenue	(484,127)
Add: Interfund transfer from MCF (Note 2)	508,807
Adjusted expenses subject to rebate	<u>\$68,595,328</u>

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#### AIR LINE PILOTS ASSOCIATION'S BREAKDOWN OF GERMANE AND NONGERMANE EXPENSES BY PROJECT

#### AIR LINE PILOTS ASSOCIATION 1992 EXPENSES BY PROJECT

Report Date: 6/15/93

DESCRIPTION	NEGOTIATIONS
Legal-General	415,001.49
Misc Legal Research	20,422.86
Legal Counsel—Misc Committee	1,848.28
Legal Counsel—Nat'l Officers	19,514.15
Insurance—Member Medical	163,932.75
Investment Management	40,318.63
Investment Manager Evaluation	1,838.06
Performance Monitoring	54,619.46
Retirement Board Meeting	10.00
Retirement Research-General	9,434.11
Pilot Benefit Summary	4,804.68
Representation—General	1,910,144.05
Representation Staff Seminar	1,625.99
ALPA Negotiations Seminar	5,111.18
Economic Analysis—General	257,044.88
Age—Wage Analysis	2,723.38
CAB Data Analysis	18,923.49
Developmental Research	425.59
General Statistical Analysis	561.78
Negotiations Questionnaire	5,311.65
Pilots Rates Of Pay	1,078.39
Financial Analysis—Airline	13,529.30
Research—Industry	70,623.78
Research—Member Related	14,473.49
Research—Staff	965.09
Summary of Agreements	14,922.01
Major Med For Members	1,787.84
Work Stoppage & Strike Asmt	494.43
Engineering—General	118,428.55
E&AS Resource Center	50,865.12

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DESCRIPTION	NEGOTIATIONS
FAA Reviews	6.27
FAA Inspections	1,592.65
FAA Aviation Rulemaking Advis	14,899.05
Accident Investigation—Gen	107,635.74
Accident/Incident Analysis	241,076.97
News Summary	6,559.95
Speech Writing	13,125.66
Publications—General	45,448.37
Advertising/Magazine	78,658.13
Advertising Administration	31,552.43
Advertising Promotion	12,536.86
Art/Production—Magazine	288,514.52
Copy Preparation	87,864.10
Editing	74,693.64
Editorial Administration	82,611.68
Photography—Magazine	17,193.57
Photography—Member	462.40
A/L Pilot Manuscript Review	5,776.39
Subscription Administration	18,977.48
Subscription Promotion	23.96
Flying The Line II	965.56
Magazine Editors Seminar	310.37
Finance Model	8,621.85
Newsletter	414.63
Per Cap Fees-IFALPA	680,686.24
Per Cap Fees-ITW	31,087.80
HIMS II Video Production	805.00
MEC Meeting Support	9,870.11
A/I NCA 07/25/78 MI	2.12
Accid Invest-TWA 4-4-79 MI	175.62
Accid Invest-MDR 8/24/84 CA	33.81
Accid Invest-Midwest 09/06/85	57.23
Accid Invest-REP EXP 3/13/86 M	135.85
Accid Invest AVA 02/19/88 NC	7,166.24
Accid Invest-PAA 12/21/88 UK	558.88
Accid Invest-UAL 02/24/89 HI	4,881.30
Accid Invest-BCA 03/31/89 NY	3.66
Accid Invest-UAL 07/19/89 IA	171.39
Accid Invest-NPA 12/26/89 WA	990.28

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DESCRIPTION	NEGOTIATIONS
Accid Invest-AAA 11/11/90 GA	37.20
Accid Invest-NWA 12/03/90 MI	51.19
Accid Invest-CCR 1/31/91 WV	1,562.29
Accid Invest-AAA 2/1/91 LAX	3,174.24
Accid Invest-UAL 3/3/91 CO	43,188.27
Accid Invest-ASE 4/5/91 GA	11,936.28
Accid Invest-BEX 12/91 RI	6,794.74
Accid Invest-DAL 1/7/92	334.82
Accid Invest-AAA 1/18/92	9,195.33
Accid Invest-Air Inter 1/20/92	270.93
Accid Invest-CCR 3/12/92 TN	5,209.37
Accid Invest-AAA 3/22/92 NY	163,541.89
Accid Invest-TWA 7/30/92 NY	94,616.26
Incid Invest-NWA 10/18/89 CO	22.68
Incid Invest-WES 1/31/92 WA	1,056.43
Incid Invest-AAA 2/8/92 San Ju	15,855.25
Incid Invest-AAA 4/22/92 NC	140.72
Incid Invest-DAL 4/24/92 NY	950.12
Accident Update Publication	19.75
Air Safety Activities-Print	76,531.96
Air Safety Seminar	21,523.60
Air Safety Workshop	96,245.33
Basic Accid Invest Course	59,923.82
Organization For Safety	2,663.08
UAL Incidents-Miscellaneous	8.50
ALPA Hot Line	2,194.19
Industry/FAA Reg Meetings	27,840.65
Civil Reserve Air Fleet	726.71
ALPA Pilot Reporting System	32,499.13
Central Air Safety Meetings	22,342.02
FAA Int'l Conf on Ground De-Ic	8,877.18
Flight Time/Duty Special Proj.	17,023.04
NASA ASRA Advisory Subcommitte	7,576.67
Accident Investigation Board	22,359.19
Accident Survival Committee	82,237.29
Air Safety Coordinators	2,747.84
Airport Standards Committee	161,008.51
Airworthiness/Perf Committee	163,815.15
All Weather Flying Committee	118,522.45

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DESCRIPTION	NEGOTIATIONS
ATC Committee	250,883.55
Aviation Weather Committee	69,682.18
CHIPS Committee	135,311.43
Exec Air Safety Struc Chrmn	87,231.25
Hazardous Materials Committee	65,662.72
Human Performance Tech Cmtee	83,682.64
New Aircraft Eval/Cert Cmtee	65,471.35
Noise Abatement Committee	70,458.86
Pilot Training Committee	96,252.38
Regional Air Line/Short Haul	57,032.63
Caribbean Rgnl Safety Coord	332.18
Central Rgnl Safety Coord	3,876.21
Great Lakes Rgnl Safety Coord	2,647.65
Hawaiian Rgnl Safety Coord	15.78
Mid-Atlantic Rgnl Safety Coord	378.11
New England Rgnl Safety Coord	80.31
Northeastern Rgnl Safety Coord	1,094.88
Northwest Rgnl Safety Coord	16,513.27
Rocky Mtn Rgnl Safety Coord	97.81
Southern Rgnl Safety Coord	80.66
Southwest Rgnl Safety Coord	2,691.50
NW Pacific Rgnl Sfty Coord	12,705.49
SW Pacific Rgnl Sfty Coord	933.30
Aircraft Coordinators	3,363.55
A-320 Study Group	9,535.30
SAE Ground De-Icing Ad Hoc Com	19,505.47
Aeromedical Advisor-Support	7,342.50
Aeromedical Advisor	629,001.33
Airport Survey	157.79
Bilateral—General	79,358.62
Board of Directors	1,018,620.95
Drug Testing Task Force	1,398.05
Drug Testing Policy	3,215.16
Executive Board	477,189.86
Executive Committee	316,353.65
IFALPA Annual Conference	66,570.75
IFALPA Projects	223,174.13
Industry Activities	282,723.59
ALPA Leadership Conf. 6/89	246,962.25

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DESCRIPTION	NEGOTIATIONS
TAA Support	5,607.82
Field Office Support—Print	68,977.64
LEC Support—Printing	32,321.85
R & I Seminar	303.26
Videotape Program	33,470.88
FTL/FED EX Merger Committee	7.50
FTL Representation Comm II	17,464.25
EAL IAM Indirect Strike Supp	1,455.09
Pan Am Pension Settlement	15,619.10
Digital Fit Data Rec Monitor	22,362.01
MEC Training Seminar 8/90	22,652.90
Furlough Assistance Program	23,562.14
PAA-UAL Arbitration (UK Route)	35,790.27
PAA Job & Benefit Workshop	51,700.62
MDW Job & Benefit Workshop	189.69
Simmons Expedited Negotiations	22,930.38
Mortality Study	189.39
Newsletter Communications	5.73
Comair Expedited Negotiations	34,108.51
Age 60 Committee	759.61
BOD Steering Committee	19,454.61
Collective Bargaining Cmtee	22,052.49
Education Committee	3,062.02
Exec Chr Aeromedical Resources	8,876.90
Flight Time/Duty Time	15,747.52
FT/DT Task Force	1,288.37
Flight Security Committee	53,555.36
IFALPA Activities Committee	32,566.24
Intl Flight/Duty Time Task F	1,157.00
Medical Exam Review Panel	2,652.86
Professional Standard Comm	5,552.31
Regional Airlines Study Subc	3,920.83
Schedule Review Committee	834.73
Merger Policy Blue Rbn Cmtee	348.36
National "No B Scale" Comm	111.00
Council On Aviation Accredit	640.88
Review & Recovery of Benefits	2,991.49
Career Re-establish Task Force	533.20

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DESCRIPTION	NEGOTIATIONS
Employee Assistance Program Co	6,096.09
Intntl Aviation Task Force	24,434.36
CRAF Advisory Committee	2,107.62
Alcohol Testing Task Force	4,988.07
Pilot Training Review Task For	32,368.29
Code Sharing Relations and Pol	3,244.71
Pilot Training Services Commit	49.46
Accident Investigation	103,805.80
Central Air Safety	1,001,160.38
Employee Stock Owership	21,446.79
HIMS Project	38,611.81
Industrial Relations Committee	1,884.03
Investment Committee	14,329.51
MEC Aeromedical Coord.	32,566.20
MEC CAB Data Analysis	68,203.63
MEC Chairman	352,584.92
MEC Financial Analysis	257,176.56
MEC Flight Pay Loss Bank	1,228,821.51
MEC Hotel Committee	90,754.36
MEC Meetings	3,029,584.41
MEC Newsletter	257,471.01
MEC Offices	3,253,263.22
MEC Pilot Pay Rates	3,408.38
MEC Professional Standards	35,461.25
MEC Questionnaire	3,621.86
MEC Scheduling	255,887.33
MEC Secretary/Treasurer	238,487.89
MEC Training	173,367.82
MEC Vice Chairman	316,986.80
New Aircraft Evaluation Cmtee	4,005.21
Uniform Committee	821.10
MEC Security—Safety	6,920.06
MEC Family Awareness Committee	10,361.88
MEC Bid Closing Committee	5,707.02
MEC Mediation/Arbitration	4,764.65
International Flying Committee	7,378.57
MEC Agreement Analysis	8,410.11
MEC Contract Proposal Costing	5,574.73
MEC Negotiation Questionnaire	16,539.86

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DESCRIPTION	NEGOTIATIONS
Contract Negotiations	4,158,517.91
Negotiations Training Seminar	1,777.67
MEC Central Scheduling	24,279.83
Insurance Negotiations	28,825.27
Insurance Openers	5,383.70
MEC Insurance	69,834.20
MEC Retirement	1,412,345.89
Pension Negotiations	41,652.46
Pension Openers	3,279.09
Local Council Legal	4,014.51
PAA Pension-Prudential Annuity	5,404.94
Roberts' Supplemental Award #5	7,464.26
Communication Family Awareness	264,102.96
AAA Strike Preparedness	71,551.25
USAir MEC Internal Communicati	845.79
USAir MEC Family Awareness	111,840.14
Strike Preparedness	864.60
CAL Member Expense	14,895.95
UAL MEC International Comm	13,168.61
TWA—Icahn Privatization	2,656.04
Regional Move-Up Committee	1,676.76
Dispute Resolution Cmtee—NWA	140,924.01
Dispute Resolution Cmtee—REP	104,358.42
AMW Fragmentation	348.32
HNA MEC Member Assistance	22.62
Midway Continuation Activity	142.55
NWA Blue Book Merger Cmtee	79,000.43
TWA "B" Plan Transition	21,071.10
PAE—Special Contract Negot	1,445.06
TWA Icahn Exit MCF	2,631,630.38
ARW Ad Hoc Comm for Spec. Proj	5,293.34
NWA Strategic Planning Committ	62,970.99
EAL II Misc Programs	75,249.64
EAL II Related Legal Expense	10.50
EAL II Stress Management-Pierr	122.64
EAL-IAM Direct Strike Suppor	103,443.09
EAL MEC: Officers & LEC Members	7,141.32
EAL MEC: Communications Cmtee	2,015.45
EAL Strike Andit Committee	94,448.83

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DESCRIPTION	NEGOTIATIONS
EAL MEC: June Davis Task Force	4,557.73
EAL MEC: Review Board	66,127.95
NWA Retirement Review Committee	27,875.13
NWA Roberts Quota Implementi	37,877.54
Temporary Duty (TDY) DAL MEC	20,851.91
Negotiating Cost Recovery-AAA	375,000.00
Executive Administrator-DAL	50,208.39
Dissolution of ARW	17,653.29
Air Traffic Control/Operations	4,144.78
MEC Merger Committee	254,284.51
AAA/PAI Merger	132,600.88
DAL/WAL Merger	314.77
EAL/TAC Merger	108.15
NWA-REP Merger	40,606.72
OZA/TWA Merger	18,161.94
PAA/UAL Pacific Routes Transfe	484.79
NWA/REP Merger-Green	133,000.76
NWA/REP Merger-Red	215,729.71
PAA/UAL London Routes Transfer	72,087.03
PNL/ALG Merger	133,967.85
TPS/AAA Merger	127,676.45
TPS Special Projects	4,406.10
Metro/Simmons/AMR Corp Merger	30,357.33
Administrative Cost—Strike	353.31

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AIR LINE PILOTS ASSOCIATION  
1992 EXPENSES BY PROJECT

Report Date: 6/15/93

DESCRIPTION	GENERAL ADMINISTRATION
Administration—Payroll	253,057.16
President Dept—General	564,298.99
General Manager—General	244,374.59
Human Resources—General	322,556.34
ALPA Staff Fringe Ben—S/L	80,348.58
ALPA Staff Fringe Ben—Other	66,091.20
ALPA Staff Union—Admin	85,415.49
Dependent Business Travel	39,676.04
Education Administration	2,488.39
Educational Assistance	39,968.45
Employee Recreation	1,500.00
ALPA Notes	1,709.27
Personnel Recruiting	21,666.37
Personnel System	730.13
Personnel Conferences	6,590.32
Salary Administration	9,505.68
Staff Mgmt Seminar	487.42
Staff Pin Awards	20,357.23
Personal Leave—Unit II	14,162.91
Retiree Health Insurance	600,667.45
Summer Intern Program	46,378.79
Questionnaire Development	34.40
Insurance	125,372.83
401 (K) Master Plan	2,351.50
Atlanta Contract Office	43,729.44
Chicago Contract Office	59,284.43
Los Angeles Contract Office	830.21
Miami Contract Office	1.28
Minneapolis Contract Office	69,229.67
New York Contract Office	56,924.80
San Francisco Contract Office	10,428.25
Washington, D.C. Administratio	313.37
St Louis Contract Office	29,420.20
Denver Contract Office	285.00
Pittsburgh Contract Office	66,176.27

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DESCRIPTION	GENERAL ADMINISTRATION
Employee Development	76,478.60
General Finance	389,519.67
Budget Preparation	57,140.27
Cash Controls	72,237.17
Financial Analysis	2,535.30
Financial Reporting	185,319.44
Annual Audit	119,767.59
Governmental Reporting	31,242.33
Investment Analysis	170.34
General Accounting	511,576.54
Accounts Payable	680,623.24
Accounts Receivable Processing	26,783.63
Admin Payroll Accrual	719,822.87
Bank Service Fees	34,400.97
Accounts Payable—FPL	105,756.34
Payroll Processing	104,422.78
Accounting System Maintenance	280,708.30
Membership—General	191,708.33
ALPA Telephone Directory	5,235.17
ALPA Admin Manual/Ofc Proc	19,739.94
Key Entry Conversion	2,143.20
Member Benefit Programs-General	2,835.02
Property Subsidy	15.38
Dir E&AS—General	160,440.39
Access	12,108.24
Info Systems/Services-General	153,419.04
Data Resources—General	62,554.75
Stairs Data Bases	6,527.96
Systems Development-General	327,695.85
Accts Rec System Development	4,067.06
Data Processing Security	51,241.66
Generalized Reporting	3,953.96
Online CICS Activity	306.37
Outside EDP Service	17,857.82
Representation Model	43.78
Software Install & Maint	340,099.00
Flight Time/Duty Time Sys Supp	110.31
Payroll Computer System Supp	206.74
Communications System Support	2,260.25
Financial Reporting Systems	32,243.09

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DESCRIPTION	GENERAL ADMINISTRATION
Database Management-General	145,797.01
Info Systems Long Range Plan	21,395.92
Work Flow/Image Processing	27,377.70
Conversant Programming	39,716.07
Image/Document Processing: Ph.	176,707.17
Image/Document Processing: Ph.	67,193.74
Image/Document Processing: Ph.	62,897.23
Image/Document Processing: Ph.	8,712.49
Info Processing—General	103,976.58
Info Processing Charge Out	179,930.04
CO/TS Support	30,334.15
OSSS Support	8,893.23
Micrographics Support	4,294.55
I/P PC Hardware Support	32,190.79
I/P PC Software Support	6,251.58
I/P Chargeback Support	18,951.68
I/P Access Support	13,013.67
I/P Voice Mail Support	4,984.41
I/P Telephone Support	3,609.68
I/P Special Projects	27,301.59
General Telephone Chargeout	560,986.96
Access Chargeout	906.30
CICS Utilities	588.62
Production Database Overhead	276.99
Test Database Overhead	895.35
Access ALPANews Usage	3,672.78
Computer Ops—General	1,120,709.29
Computer Ops Charge Out	1,119,787.71
IDMS Online Charges	238,448.72
CMS Online Charges	69,459.90
System Software Installation	16,954.19
System Software Maintenance	99,176.85
Mainframe Software Utilities	85,187.39
Word Processing—General	211,085.77
Data Entry—General	3,044.67
Departmental Admin Support	25,326.04
Word Processing Charge Out	120.00
Help Desk	6,797.45
Telephone	78,167.06
FAX	10,898.98

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DESCRIPTION	GENERAL ADMINISTRATION
Execubill	17,528.61
Micrographics—General	18,378.86
Printing—General	2,422,162.09
Printing Charge Out	2,480,208.55
Mailing—General	152,694.70
Mailing—Charge Out	122,762.53
Computer Ops—Clearing	285.87
Office Admin—General	403,018.85
Communication & Transport	173,204.01
Equipment—DC Office	250.00
F/O Support—Administration	2,967.89
F/O Support—Visits	5,537.43
Hotel—General	21,197.99
Moving Expense	586.43
Purchase Processing	25,534.20
Records Management	287,837.25
Office Rent Charges	1,182,264.00
Equipment Depreciation Charges	324,049.02
Office Telephone Charges	587,607.47
Atlanta Field Office	280,836.96
Atlanta Office Building	787.62
Chicago Field Office	252,699.67
Denver Field Office	183,138.93
Houston Field Office	204,668.23
Miami Field Office	242,836.48
Minneapolis Field Office	301,101.32
New York Field Office	263,135.38
San Francisco Field Office	288,012.18
Seattle Field Office	120,673.16
1625 Mass Ave Real Estate	2,286.23
Herndon Real Estate	2,316.98
Access System Administration	45,737.81
Access System Support	46,773.19
Access System Maintenance	780.86
Access Upgrade Support	57,062.31
Aspen System Administration	387,286.47
Aspen System Support	18,625.69
Vars System Support	20,766.90
Vars System Maintenance	3,028.25

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DESCRIPTION	GENERAL ADMINISTRATION
Vars System Upgrade	16,679.06
Office Automation Administrati	334,876.78
Office Automation Upgrade	164,839.73
Herndon Office Support	110,374.47
D.C. Office Support	44,169.86
Field Office Support	14,558.54
MEC Office Support	15,399.48
FTL MEC Assessment	156.30
Office Conference Support	4,252.20
Severance Pay—Exempt	175,378.57
Special Washington Office	898,119.41
Printing—Fixed Cost	233,352.00
60th Anniversary Celebration	265.37
Personal Property Tax	85,378.35
Part-time Work Task Force	6,787.46
Job Enrichment Through Trainin	180,374.09
EDP Advisory Committee	24,170.00
Conference Facilities	19,471.36
Field Services Special Study C	1,065.52

AIR LINE PILOTS ASSOCIATION  
1992 EXPENSES BY PROJECT

Report Date: 6/15/93

DESCRIPTION	UNION ADMINISTRATION
1st Vice President—General	98,458.38
Administration—1st VP	216,027.67
Secretary—General	172,591.67
Administration—Secretary	82,745.78
Treasurer—General	307,312.45
Administration—Treasurer	70,262.32
Audit—Field Offices	3,541.66
Audit—MEC	1,632.53
Executive Administrator—Gen	67,500.87
Executive Administrator	239,346.93
Fiduciary Liability Insurance	303,292.30
Captive Insurance	101,741.90
MEC Misc Support	175,269.58
Agency Shop Maintenance	95,936.00
Delinquent Member Activity	70,095.16
Letter Production	39,208.91
Dues Processing	69,199.67
Assessment Processing	50,784.37
Balloting	82,831.49
Direct Airline Input	21,799.97
Dues Adjustment Processing	115,424.96
Dues Check-Off Processing	234,357.27
LEC & MEC Assessment	6,247.24
Member Document Tracking	28,731.62
Pilot Information Maintenance	66,862.22
Roster Verification Program	70,022.46
Member Credentials	110,692.03
Reference/Research	81,755.43
Relations—Industry	99,926.64
Relations—Member	211,273.69
ALPA Hangar Publication	1,584.02
Newsletter Editors-Services	13,523.65
ASPEN	289,269.95
ALPA Constitution & By-Laws	350.56
Bulletin (Info Distribution)	52,293.89

DESCRIPTION	UNION ADMINISTRATION
Computer Training Seminars	2,166.70
Exec VP—Group 1	2,819.22
Exec VP—Group 2	6,358.89
Exec VP—Group 3	2,912.79
Exec VP—Group 4	2,731.30
Exec VP—Group 5	3,766.54
General Counsel Expenses	283,401.06
LEC Support—Meetings	3,327.62
National Officer Election	1,711.88
Arbitration/Litigation	3,993.97
Regional Meetings	33,352.16
President's Annual Report	21,039.15
Ballot Printing	42,123.89
LEC Support—Admin	56,195.27
Rebate 1990	64.09
Election Protest Activity	36,536.14
Rebate 1991	40,196.10
LEC Support—Telephone	32,106.88
Rebate 1992	9,463.68
Exec VP-AAA Group A	400.00
Exec VP-DAL Group A	400.00
Exec VP-NWA Group A	400.00
Exec VP-UAL Group A	400.00
Exec VP-TWA Group B	400.00
Exec VP-Group C (Salz)	400.00
Exec VP-Group D (Abel)	400.00
Exec VP-Group D (Travitz)	400.00
ALPA Financial Structure Com	42,622.19
BOD Election Procedures Study	4,701.00
Cmtee for Restructure & Financ	156,114.29
Appeal Boards	16,473.11
Ballot Certification Comm	10,376.63
Hearing Boards	18,689.96
LEC-MEC Training/Education	19.56
MEC Administration	3,042,542.45
MEC Duty Officer	346,996.41
MEC Misc Administration	293,115.68
MEC-Local Council Support	38,591.26
Dues Enforcement—Delta	9,662.01

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DESCRIPTION	UNION ADMINISTRATION
EAL MEC : Article VIII Ad Hoc	9,359.82
NWA Information Systems	13,944.59
Pan Am Express Custodianship	39,826.26
Pan Am Custodianship	159,281.00
Midway Commuter Custodianship	7,592.60
Midway Custodianship	26,294.83
Eastern Custodianship	179,119.97
Zenith Custodianship	7,659.91
TWA LEC 3	26,208.00
UAL LEC 5	716.01
DAL LEC 9	3,502.36
NWA LEC 10	977.36
UAL LEC 11	11,160.00
UAL LEC 12	36,241.83
NWA LEC 13	1,126.08
DHL LEC 17	2,389.66
NWA LEC 20	14,980.52
PAE LEC 22	106.87
PRE LEC 23	174.41
HNA LEC 28	1,835.48
HNA LEC 29	1,494.00
AAA LEC 32	2,502.00
HNA LEC 35	1,314.00
STW LEC 36	26.60
CMR LEC 37	5,326.60
CCR LEC 40	2,610.00
AAA LEC 41	7,120.80
CMR LEC 45	2,363.98
DAL LEC 47	24,106.81
DAL LEC 48	876.76
ARW LEC 50	1,566.47
NWA LEC 55	219.98
REV LEC 59	675.00
ARW LEC 60	216.81
JTS LEC 61	691.32
ALA LEC 63	1,908.00
ALA LEC 64	609.60
HAL LEC 65	3,194.74
JTS LEC 69	442.73
NWA LEC 74	2,778.15

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DESCRIPTION	UNION ADMINISTRATION
ROS LEC 75	239.47
ALG LEC 78	1,413.24
ALO LEC 80	2,238.39
DAL LEC 81	8,647.32
SAI LEC 83	3,909.68
AMW LEC 84	18.16
AMW LEC 86	84.08
AAA LEC 90	32,400.00
PNL LEC 91	486.00
PNL LEC 92	400.68
AAA LEC 94	35,820.00
PNL LEC 95	1,026.97
SUN LEC 105	235.27
MSA LEC 106	364.19
DAL LEC 108	3,029.94
ASE LEC 113	1,530.00
CRN LEC 115	464.70
ZAL LEC 121	400.00
DAL LEC 124	2,430.00
MDC LEC 128	37.45
EXA LEC 130	1,894.33
SAI LEC 132	522.00
USS LEC 135	3,840.06
MRK LEC 137	460.62
AAA LEC 138	5,418.00
ACO LEC 141	1,225.24
EAL LEC 142	119.17
WES LEC 143	30.07
AIS LEC 146	109.68
AAA LEC 148	10,082.96
PAE LEC 149	44.87
BEX LEC 153	999.91
BEX LEC 154	644.53
BEX LEC 155	2,556.40
TWE LEC 156	1,363.19
TWE LEC 157	787.80
TWE LEC 159	259.88

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AIR LINE PILOTS ASSOCIATION  
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Report Date: 6/15/93

DESCRIPTION	GRIEVANCES
Arbitration Index	1,246.78
Grievances	1,344,768.55
System Board	1,775,047.76
MEC Grievance Review Board	19,779.35
Pension Dispute Board	19,923.30
TWA A Plan Lump Sum	3,837.32

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AIR LINE PILOTS ASSOCIATION  
1992 EXPENSES BY PROJECT

Report Date: 6/15/93

DESCRIPTION	LITIGATION
ALPA Legal Counsel-Members	24,641.50
Federal Agency—NMB	15,714.58
Federal Agency—Other	6,096.96
EAL Bankruptcy Litigation	12,155.40
ALPA vs TWA (Absentee Plcy)	231.09
ALPA vs DOL (EPPs)	109.03
Baldwin vs Mesa Airlines	60,816.46
Pan Am vs ALPA (re: H. Gay)	1,666.94
ALPA vs DOT (Section 43 Bens)	14,898.24
Turner & Turner vs AMEX & ALPA	930.75
ALPA vs DOT (EPI)	38,584.64
Federal Agency—NTSB	14,679.85
Federal Agency—FAA	17,723.24
LPP Provisions	6,127.44
Pa'd vs ALPA Lawsuit	701.78
PAA vs ALPA (re: H. Gay)	6,835.00
Exec Cmtee Approved Admin Supp	170,150.14
Rogers & Baker v. ALPA	38,783.07
Landry Case Settlement Fee	200,000.00
FAA Enforcement Cases	698,881.26
FAA Medical Cases	19,786.05
CAB/DOT Litigation	87,561.83
Misc Litigation	489,853.71
Robinson vs ALPA, Braniff	8,681.36
Burnett vs Express I Airline	6,187.01
Miller EEOC Matter	4,337.12
Dean vs TWA & ALPA	61,044.97
EAL Bankruptcy Litigation	145,860.44
ALPA vs Hawaiian Airlines	31,892.98
ALPA vs TWA (Absentee Policy)	53.08
ALPA vs DOT (EAL Petition)	1,826.93
Homer vs Van Hoosen et al	74.75
ALPA vs DOT (LPPs)	6,830.84
ALPA vs Metro (II)	178.39
Frey vs TWA & Aetna	1,941.47

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DESCRIPTION	LITIGATION
Tally vs Aetna & TWA	6,271.81
Walker vs ALPA	1,461,414.40
ALPA vs Aviation Associates	8,754.44
Gellert vs EAL	23,734.32
Beckett et al vs ALPA	5,047.73
Kuball vs ALPA	2,414.26
ALPA vs MET et. al.	96.95
Nielsen vs TWA et al	46.36
Berg vs UAL	572.82
Jetstream vs ALPA (Spires)	2,036.03
ALPA vs TWA (Drug Testing)	26.54
Hudson vs ALPA	1,915.94
McWhorter vs Dalfort	1,845.71
TWA W.A.R.N. Act Lawsuit	2,562.79
Frye et al vs ALPA et al	213,261.43
Kuball vs ALPA (Nevada)	14,593.43
Thompson vs ALPA, NWA & Prude	9,664.38
Krantz vs ALPA & Nottke	21,997.50
UAL—570 Litigation	28,711.02
EAL vs Heddon et al	22.65
Transamerica Pension Litigatio	51,050.63
Miller et al vs ALPA & Delta	105,681.35
ALPA vs Solberg	5,591.01
U.S. vs Northwest Airlines	1,110.68
Kehns et al vs Foster et al	39,091.59
Burke vs ALPA & Eastern MEC	15,987.57
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Frontier Bankruptcy	70.21
Wright Bankruptcy 11/84	312.30
BNF Bankruptcy 09/27/89 (2nd T	17,107.46
Presidential Bankruptcy 10/89	261.37
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Midway Bankruptcy	42,948.75
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Metroflight Chapter 11 Bankrup	44,078.45
Midway Commuter Bankruptcy 3/	3,403.32
Metro (Northeast) Bankruptcy	17,708.98
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AIR LINE PILOTS ASSOCIATION  
1992 EXPENSES BY PROJECT

Report Date: 6/15/93

DESCRIPTION	LEGISLATION
Government Affairs—General	51,352.49
Congressional Testimony Prep	836.92
Congressional Reception	44,282.98
Congressional Relations	265,297.13
Congressional Hearings	3,413.06
Legislative Briefing	13,205.38
Legislative Research	19,546.70
Position Paper Development	146.39
Pension/Insurance Legislation	47,749.02
Research—Governmental	15.00
Congressional Testimony	14,767.97
AFL-CIO Relations	68,957.89
LPP Deregulation	3,313.96
Member Political Education	25,484.34
Presidential Inaugural Activit	14,650.00
Legislative Affairs Cmtee	18,452.45
PAC Steering Committee	65,839.77
Strategic Planning Committee	25,941.33
MEC Legislative Committee	120,870.24
NWA Political Consultant Chgs	98,600.00
EAL II Legislative Program	524.33

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AIR LINE PILOTS ASSOCIATION  
1992 EXPENSES BY PROJECT

Report Date: 6/15/93

DESCRIPTION	PUBLICATIONS
Public Relations—General	151,180.45
News Summary	5,367.24
Relations—Press	132,543.38
Relations—Public	26,370.00
Speech Writing	10,739.17
Publications—General	37,185.03
Advertising/Magazine	64,356.65
Advertising Administration	25,815.63
Advertising Promotion	10,257.43
Art/Production—Magazine	236,057.33
Copy Preparation	71,888.81
Editing	61,112.97
Editorial Administration	67,591.37
Photography—Magazine	14,067.46
Photography—Member	378.33
A/L Pilot Manuscript Review	4,726.13
Subscription Administration	15,527.03
Subscription Promotion	19.60
Dir:Communications—General	127,491.97
Magazine Editors Seminar	253.93
Newsletter	339.25
Field Office Support—Print	56,436.25
LEC Support—Printing	26,445.15
Pilot Spokesman Program	2,458.27
Pilot Image Advertisements	3,393.24
Newsletter Communications	4.68
Aviation Community Relations	112,870.67
MEC Communications Project	306,958.54
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Pilot Information Committee	329,158.88
US Too	1,881.79

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AIR LINE PILOTS ASSOCIATION  
1992 EXPENSES BY PROJECT

Report Date: 6/15/93

DESCRIPTION	ORGANIZING
Trump Shuttle Special Org	1,185.29
Organizing—General	4,812.96
West Air Organizing	4,498.32
TAC Organizing	721.14
FED EX/FTL Organizing	2,791.65
Business Express Organizing	53,596.97
Inactive Participants	9,062.48
New Hire Info Program	25,171.56
Education/P.I.P.—General	413.54
Organizing—ALPA	11,930.38
Pilot Information Program	2,334.85
AIA Support	314,584.17
Fed Ex Organizing	658,106.73
Horizon Organizing	146.98
American Eagle Organizing	6,128.71
Mesa Wholly-Owned Meetings	1,627.71
Skywest Organizing	27,229.30
MEC Membership	36,344.92

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AIR LINE PILOTS ASSOCIATION  
1992 EXPENSES BY PROJECT

Report Date: 6/15/93

DESCRIPTION	INSURANCE
Retirement & Insurance—Gen	330,969.84
Dues & Insurance Processing	134,188.74
IFALPA Member Insurance	3,175.14
Insurance Check-Off	3,923.97
Insurance Processing	379,916.49
Member Payment Processing	143,454.61
Member Inquiry	89,742.58
Retirement & Insurance Comm	62,107.47

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AIR LINE PILOTS ASSOCIATION  
1992 EXPENSES BY PROJECT

Report Date: 6/15/93

DESCRIPTION	CHARITABLE
Aviation Research & Education	18,451.45
Contributions	56,250.00
Memberships	16,250.00
Mutual Aid	1,055.36
Scholarship Administration	33,070.17

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AIR LINE PILOTS ASSOCIATION  
1992 EXPENSES BY PROJECT

Report Date: 6/15/93

DESCRIPTION	AFL-CIO
Per Cap Fees-AFL/CIO National	162,211.76
Per Cap Fees-AFL/CIO Other	40,809.15
AIA :Union Privilege Benefits	2,683.66
AFL-CIO MTG 10/19/87	5,423.53

## AMERICAN ARBITRATION ASSOCIATION

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 AAA Case No. 16-673-00277-93DS

 In the Matter of Arbitration  
 between

 AIR LINE PILOTS ASSOCIATION (ALPA),  
*Union*  
 and

 AGENCY FEE CHALLENGERS,  
*Challengers*  
 (Agency Fee Arbitration)
 

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## SUPPLEMENTAL OPINION AND AWARD

On August 10, 1994, the undersigned duly appointed Arbitrator issued an Award in the above-referenced matter. The Award directed the Union to recompute the fee chargeable to agency fee payers by subtracting payments to IFALPA and ITW, expenses for Newsletter Services, and all expenses linked to the Department of Government Affairs, on the basis that those charges were nongermane expenses.

By letter dated September 1, 1994, the Air Line Pilots Association submitted revised calculations of germane expenses, pursuant to the Arbitrator's Award of August 10, 1994.

Those calculations resulted in a finding that 79.51% of expenses are germane and chargeable to agency fee payers. We have reviewed the calculations and find that they are correct. Accordingly, we adopt those calculations

and find that 79.51% of the expenses of the Union are chargeable to non-member agency fee payers.

The Union also proposed certain changes in the Arbitrator's opinion involving typographical errors, grammatical errors and some minor corrections regarding the facts in the case. None of the proposed corrections involved any alteration in the Arbitrator's findings or conclusions. None of the proposed corrections affect any material aspect of the Arbitrator's Opinion & Award and are adopted for purposes of clarification and/or to correct obvious errors. We are issuing an Amended Opinion to reflect those changes and corrections.

In response to the Union's proposed corrections and its recalculation of germane expenses chargeable to agency fee payers, Mr. Hudock, representing a number of Challengers, filed a reply.

We have carefully reviewed the reply of the Challengers' counsel which, in substantial measure, reiterates earlier arguments as to the Union's failure to furnish adequate detail of its expenses to permit an appropriate review by the Challengers and by the Arbitrator. It cites ALPA's detailed listing of expenses linked to lobbying activities not previously identified. It then argues that projects identified as involving germane expenditures were, in fact, devoted to lobbying and were then subtracted as a result of the Arbitrator's order.

We view the Challengers' contentions as no more than an effort to have the Arbitrator reconsider his decision regarding the adequacy of the information provided by the Union regarding its expenses.

In our Opinion & Award, dated August 10, 1994, the undersigned concluded that the Union had provided sufficient detail regarding its expenses and how they were categorized to permit appropriate inquiry by the Challengers and by the Arbitrator. The fact that items not

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specifically identified as lobbying expenses were later categorized as nongermane, does not, in the opinion of the undersigned, establish an effort by the Union to intentionally withhold information or preclude appropriate inquiry into all listed expenses. We note that broad categories of expenses were explained. We do not view the failure to specifically explain each of 1,200 projects as evidence of intentional withholding of information necessary to allocate categories of expenses between germane and nongermane expenses. We note that the specific items identified by the Challengers' counsel involved small expenditures. The largest expenditure, subtracted as nongermane because it involved lobbying, relations-member, involved \$124,290 and constituted .0018% of total expenses. The total reallocated from germane to nongermane was \$300,224, equal to .004% of the total of all expenses.

Based on all of the above, we find no merit in the contentions advanced by counsel for the Challengers and reaffirm our earlier original decision that the Union did provide adequate information to permit a proper inquiry and determination as to the proper charges to agency fee payers.

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### AWARD

The undersigned Arbitrator issued an Award, dated August 10, 1994, directing a modification of the agency fee originally set as chargeable to nonmember agency fee payers. The undersigned amends that Award by finding that the revised amount of expenses chargeable to agency fee payers is determined to be 79.51% of the expenses of the Air Line Pilots Association.

September 30, 1994

/s/ Louis Aronin  
LOUIS ARONIN  
Arbitrator

[Filed Jun. 9, 1997]

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 96-7033

ROBERT A. MILLER, *et al.*,  
*Appellants*  
v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,  
an unincorporated association,  
*Appellee*

BEFORE: Silberman, Williams and Rogers, Circuit  
Judges.

ORDER

Upon consideration of appellee's petition for rehearing  
filed April 11, 1997, and of the response thereto, it is

ORDERED that the petition be denied.

*Per Curiam*

FOR THE COURT:  
MARK J. LANGER  
Clerk

By: /s/ Robert A. Bonner  
ROBERT A. BONNER  
Deputy Clerk

A statement of Circuit Judge Silberman concurring in  
the denial of the petition, joined by Circuit Judge Williams,  
is attached.

SILBERMAN, *Circuit Judge*, with whom WILLIAMS, *Circuit Judge*, joins, concurring in the denial of rehearing: Air Line Pilots Association argues in its petition for rehearing that our opinion is inconsistent with the rationale of *Cole v. Burns Int'l Security Services*, 105 F.3d 1465 (D.C. Cir. 1997). In *Cole* we held that an employer can enforce an agreement to arbitrate federal statutory discrimination claims which an employee signs as a condition of employment. *Id.* at 1482, 1484-85, 1487. ALPA concedes that the non-union pilots did not sign a written arbitration agreement, as did Cole, but argues that arbitration is nonetheless a condition of employment because it arises from the agency shop agreement between ALPA and the airline. But, as appellant correctly notes, under the agency shop agreement, ALPA is the agent for the nonmembers only vis-à-vis the employer, it is not an agent for the nonmembers vis-à-vis itself. So *Cole* is irrelevant to this case.

[Filed Jun. 9, 1997]

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 96-7033

ROBERT A. MILLER, *et al.*,  
*Appellants*

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,  
an unincorporated association,  
*Appellee*

---

BEFORE: Edwards, Chief Judge; Wald, Silberman,  
Williams, Ginsburg, Sentelle, Henderson,  
Randolph, Rogers, Tatal and Garland, Cir-  
cuit Judges

ORDER

Upon consideration of appellee's Suggestion for Re-  
hearing *In Banc*, the response thereto, and the absence of  
a request by any member of the court for a vote, it is

ORDERED that the suggestion be denied.

*Per Curiam*

FOR THE COURT:  
MARK J. LANGER  
Clerk

By: /s/ Robert A. Bonner  
ROBERT A. BONNER  
Deputy Clerk

Circuit Judge Garland did not participate in this matter.

4

Supreme Court, U. S.

FILED

OCT 31 1997

No. 97-428

CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1997

AIR LINE PILOTS ASSOCIATION,

*Petitioner,*

v.

ROBERT A. MILLER, *et al.*,

*Respondents.*

On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the District of Columbia Circuit

BRIEF IN OPPOSITION TO  
PETITION FOR A WRIT OF CERTIORARI

RAYMOND J. LAJEUNESSE, JR.  
*Counsel of Record*  
National Right to Work Legal  
Defense Foundation, Inc.  
8001 Braddock Road, Suite 600  
Springfield, VA 22160  
(703) 321-8510

PHILIP F. HUDOCK  
P.O. Box 3796  
Reston, VA 20195  
(703) 757-9577

ATTORNEYS FOR RESPONDENTS

October 31, 1997

26PP

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1997

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No. 97-428

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AIR LINE PILOTS ASSOCIATION,

*Petitioner,*

v.

ROBERT A. MILLER, *et al.*,

*Respondents.*

---

**On Petition for a Writ of Certiorari  
to the United States Court of Appeals  
for the District of Columbia Circuit**

---

**BRIEF IN OPPOSITION TO  
PETITION FOR A WRIT OF CERTIORARI**

---

Pursuant to Supreme Court Rule 15, Respondents Robert A. Miller, *et alia* ("the Pilots"), oppose the Petition of the Air Line Pilots Association ("ALPA").

**CONSTITUTIONAL AND STATUTORY  
PROVISIONS INVOLVED**

Besides the provisions set out in the Petition ("Pet.") at 2, this case raises issues under Article III of the Constitution of the United States. It provides in pertinent part:

**Section 1.** The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . .

**Section 2.** The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution [and] the Laws of the United States . . . .

## REASONS FOR DENYING THE PETITION

### I. Whether Nonunion Employees Must Exhaust a Union's "Impartial Decisionmaker" Procedure Before They May Challenge the Union's Agency Fee in Court Was Implicitly Decided in *Teachers Local 1 v. Hudson*, and Ought Not to Be Revisited on the Record in This Case. Being More Imaginary than Real, the Conflict Among the Circuit Courts to Which ALPA Points Also Does Not Support a Writ of Certiorari.

In light of *Teachers Local 1 v. Hudson*, 475 U.S. 292 (1986), that the Pilots need not exhaust ALPA's "impartial decisionmaker" procedure before they may challenge the union's agency fee in court is really not a controversial issue. Therefore, a writ of certiorari is inappropriate here.

A. ALPA cannot deny the black-letter rule of law that a party can be required to arbitrate a dispute only where there is a contract or other voluntary agreement to do so, or some statutory mandate. *E.g.*, *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 648-49 (1986); *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368, 374 (1974); *Abrams v. Communications Workers*, 59 F.3d 1373, 1382 & n.14 (D.C. Cir. 1995). Neither can ALPA deny that the Pilots did not contract for, or otherwise agree to, arbitration of their agency-fee dispute. Some of the Pilots participated in ALPA's arbitration only under protest, after the District Court denied an injunction to stop it. Others refused to participate at all. (Appendix ("App.") at 2a-3a.)

Moreover, the Pilots are nonmembers of ALPA. (*Id.* at 2a.) As such, they are "not bound by contract with the union to

exhaust any formal internal union appeals before resorting to a judicial forum." *Soto Segarra v. Sea-Land Serv., Inc.*, 581 F.2d 291, 295 (1st Cir. 1978); *see Bagnall v. ALPA*, 626 F.2d 336, 341 (4th Cir. 1980), *cert. denied*, 449 U.S. 1125 (1981).

The mere existence of a collective-bargaining agreement negotiated by ALPA could not require the Pilots to arbitrate their disputes with *itself*, as opposed to disputes with their employer. *Food & Commercial Workers Local 951 v. Mulder*, 31 F.3d 365, 368-69 (6th Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995); *Bagnall*, 626 F.2d at 342; *but see Lancaster v. ALPA*, 76 F.3d 1509, 1524-26 (10th Cir. 1996).<sup>1</sup> And, as even the District Court recognized in this case, (App. at 30a), ALPA cannot contend that the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151-88 (1988), requires arbitration of agency-fee disputes. *See Bagnall*, 626 F.2d at 342.

B. ALPA maintains, however, that whether a court should require exhaustion of arbitration in an agency-fee context is an open, contentious issue, because *Hudson* "did not address the question of whether an objector must exhaust [a union-imposed arbitration] procedure before bringing suit in court" on an agency-fee dispute. (Pet. at 11.)

To the contrary, in holding that the union's procedure in *Hudson* was constitutionally "inadequate because the selection [of the arbitrator] represents the Union's unrestricted choice," this Court noted that, even if both parties selected the arbitrator,

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<sup>1</sup> On this point (as well as others discussed *infra* p. 11), *Lancaster* is clearly wrong. *See Abrams*, 59 F.3d at 1382 ("procedure requiring an objector who challenges [an agency fee] to exhaust Union-provided arbitration violates [the] duty of fair representation by limiting the choice of forum for the challenge"); App. 163a (Silberman, J., concurring in denial of rehearing) ("under the agency shop agreement, ALPA is the agent for the nonmembers only vis-à-vis the employer, it is not an agent for the nonmembers vis-à-vis itself").

"[t]he arbitrator's decision would not receive preclusive effect in any subsequent [42 U.S.C.] § 1983 [(1988)] action. See *McDonald v. [City of] West Branch*, 466 U.S. 284 (1984)." 475 U.S. at 308 & n.21. The Court was aware of Justice White's suggestion that "if the union provides for arbitration . . . it should be entitled to insist that the arbitration procedure be exhausted before resorting to the courts," but chose not to accede to it. Compare *id.* at 311 (concurring opinion) with *id.* at 308-09 (opinion of the Court). The Court's action clearly implies that, if the union alone opts for arbitration, arbitration cannot be required of nonunion employees.

As *Hudson* recognized by citing *McDonald*, compelled arbitration can never be appropriate, because arbitration cannot provide "an adequate substitute for a judicial proceeding in protecting . . . federal statutory and constitutional rights." *McDonald*, 466 U.S. at 290. The Pilots' claim that some of ALPA's expenditures of their agency fees were not "necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative" raises issues under both the RLA and the First Amendment to the United States Constitution. See *Ellis v. Railway Clerks*, 466 U.S. 435, 445-48, 455-56 (1984).

The district courts Congress created under Article III of the Constitution "have original jurisdiction of all civil actions arising under the Constitution [or] laws . . . of the United States," including "any civil action . . . arising under any Act of Congress regulating commerce." 28 U.S.C. §§ 1331, 1337(a). Neither the RLA nor any other statute delegates this jurisdiction to arbitrators designated by unions in agency-fee cases. Therefore, Article III and the *Judicial Code* prohibit federal courts from deferring, on issues of law or fact, to "non-statutory arbitration conducted by a privately appointed decisionmaker" in agency-fee cases. *Bromley v. Michigan Educ. Ass'n*, 82 F.3d 686, 692 (6th Cir. 1996) (§ 1983 case), *cert. denied*, 117 S. Ct. 682 (1997); see *Stauble v. Warrob, Inc.*, 977 F.2d 690, 696-98 (1st Cir. 1992); *In re Bituminous Coal Operators' Ass'n*, 949 F.2d 1165, 1169 (D.C. Cir. 1991).

Furthermore, whether arising under the RLA or the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151-69 (1988), disputes about agency fees involve a union's duty of fair representation ("DFR"). E.g., *Communications Workers v. Beck*, 487 U.S. 735, 742-44 (1988) (NLRA); *id.* at 745-47, 752 (the agency-fee provisions of the RLA and NLRA must be interpreted "in the same manner"). This Court first created the DFR under the RLA. *Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944). It later applied the same duty to unions operating under the NLRA. *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337 (1953). This Court then held that the judiciary retained and should exercise original jurisdiction over DFR claims, although those claims might raise issues otherwise cognizable as "unfair labor practices" normally within the exclusive jurisdiction of the National Labor Relations Board. *Vaca v. Sipes*, 386 U.S. 171, 176-88 (1967); *accord Breininger v. Sheet Metal Workers Local 6*, 493 U.S. 67, 74 (1989). Subsequently, the Court applied this principle to agency-fee cases. *Beck*, 487 U.S. at 742-44.

Clearly, if federal courts need and ought not defer to a federal agency in agency-fee cases arising under the DFR, they need and ought not defer to a private arbitration set up by the very union that employees claim violated its DFR. Indeed, a "procedure requiring an objector who challenges [an agency fee] to exhaust Union-provided arbitration violates [the] duty of fair representation by limiting the choice of forum for the challenge." *Abrams*, 59 F.3d at 1382. Although *Hudson* did not advert explicitly to the DFR (no doubt because *Hudson* was a public-sector case arising under § 1983), this Court grounded its entire analysis on "[b]asic considerations of fairness, as well as concern for the First Amendment rights at stake." 475 U.S. at 306 (emphasis added); see *Abrams*, 59 F.3d at 1379 n.7.

*Hudson* did not suggest that "an expeditious arbitration might satisfy the requirement of a reasonably prompt decision by an impartial decisionmaker, so long as the arbitrator's selection did not represent the Union's unrestricted choice," to oust the courts of jurisdiction in cases in which unions adopt an arbitration

scheme. 475 U.S. at 308 n.21. It made that point to "reject the Union's suggestion that the availability of ordinary judicial remedies is sufficient" to meet the union's special, independent responsibility itself "to provide procedures that . . . facilitate a nonunion employee's ability to protect his rights." *Id.* at 307 n.20.

That is, to render an agency-shop arrangement arguably constitutional at all, a union must affirmatively establish a procedure for an expeditious decision by an "impartial decision-maker." But the Court clearly countenanced no notion that the union could compel nonunion employees to resort to such a procedure before seeking judicial relief.

To the contrary, *Hudson* "presume[d] that the courts remain available as the ultimate protectors of constitutional rights." *Id.* at 307 n.20. Creation of a scheme for an "impartial decision-maker" is thus a special duty *Hudson* imposed on unions solely to "facilitate a nonunion employee's ability to protect his rights," *id.* (emphasis added), if the employee chooses to avail himself of it. It is not a grant to unions of new powers over such employees. If nonunion employees believe, as the Pilots do, that such a scheme does not facilitate, but rather impedes, their rights, they remain free to seek "ordinary judicial remedies," *id.* See *Tierney v. City of Toledo*, 917 F.2d 927, 939-40 (6th Cir. 1990) (a requirement that nonunion employees exhaust arbitration before seeking judicial relief "unduly implies a limitation upon the [nonmembers'] constitutional rights").

C. Even if *Hudson* could be read to have left debatable the issue of whether nonunion employees can be compelled to use an arbitration in which "the arbitrator's selection did not represent the Union's unrestricted choice," 475 U.S. at 308 n.21, (which the Pilots deny), the record here is not suited for resolution of that issue. *Hudson* expressed deep concern with unilateral selection of an arbitrator by a union, finding such a scheme unconstitutional under the First Amendment "because the selection represents the Union's unrestricted choice from the state list." 475 U.S. at 308.

In *Hudson*, "the Union President . . . select[ed] an arbitrator from a list maintained by the Illinois Board of Education." *Id.* at 296. Here, ALPA has selected the American Arbitration Association ("AAA") as its intermediary. "[A]t the union's request, the AAA appointed an arbitrator in accordance with its rules from 'a special panel of arbitrators experienced in employment relations.'" (App. at 2a.)

This is a procedural distinction without a practical difference. In both cases, the union selected *the list* from which *someone other than the nonunion employees* chose the arbitrator. As the Court of Appeals observed, "It may well be . . . that the arbitrators chosen by the AAA from a group 'experienced in labor matters' would not be perceived as typically sympathetic to [the Pilots] (or their counsel)." (*Id.* at 12a.)<sup>2</sup> It strains credulity to the breaking-point to believe that ALPA chose to employ the AAA's "special panel of arbitrators experienced in employment relations" for a reason other than that it considered those individuals friendly to its position.

In any event, however, the record does not show whether in practice ALPA's scheme amounts to "the Union's unrestricted choice," because of the attitudes of the "special panel of arbitrators," or somehow might be deemed as fair as a mutual choice of the arbitrator by both ALPA and the Pilots. The record also does not show how the special panel is selected or what say, if any, unions have in that selection.

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<sup>2</sup> The Pilots' perception here was certainly borne out, because the arbitrator selected by the AAA denied them any discovery, (App. at 3a), thus tilting the playing field in ALPA's favor.

Thus, any attempt to resolve this issue now would entangle this Court in a purely hypothetical case.<sup>3</sup> The Pilots submit that, as a matter of First-Amendment law and the DFR, a court can impose no arbitration on nonunion employees in an agency-fee dispute; but, if arbitration can be required, it surely must provide for *mutual* selection of the actual arbitrator by the union *and the nonunion employees*, not simply by the union through the union's self-selected surrogate. "By definition, an arbitrator must be a person chosen by mutual agreement." The "essential element of arbitration" is "that the selection of the particular arbitrator or the method of selection of an arbitrator be established by mutual agreement between the parties." *Bethlehem Mines Corp. v. Mine Workers*, 344 F. Supp. 1161, 1165 (W.D. Pa. 1972), *aff'd*, 494 F.2d 726 (3d Cir. 1974); *see Associated Plumbing & Mech. Contractors v. Plumbers Local 447*, 811 F.2d 480, 483-84 (9th Cir. 1987).

Therefore, to argue its case, ALPA must show that, in fact, the AAA's procedure is the practical equivalent of mutual selection of the arbitrator. The record, however, renders such a showing impossible, as that issue was not litigated below. ALPA's only other recourse is to contend that, even assuming the AAA's procedure is *not* the practical equivalent of mutual selection, nevertheless the procedure passes muster under the First Amendment. But this Court has already decided this issue

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<sup>3</sup> Some courts have held that the AAA's procedure satisfies *Hudson's* requirement for an "impartial decisionmaker." *E.g., Damiano v. Matish*, 830 F.2d 1363, 1372 (6th Cir. 1987). These opinions, though, dealt only with the situation in which nonunion employees might *voluntarily* use such a scheme. The AAA's procedure might arguably comport with *Hudson*, but only because nonunion employees could still bring their claims to court. To the extent that ALPA might argue that these cases support *compelled* arbitration, they are neither binding nor persuasive—because in this case there is no record as to whether the AAA's procedure is, in fact, as fair as mutual selection of the arbitrator. *See United Transportation Union v. State Bar*, 401 U.S. 576, 583 (1971).

adversely to ALPA, in *Hudson*, where it held that "review by a Union-selected arbitrator . . . is . . . inadequate" under the First Amendment. 475 U.S. at 308 (footnote omitted).

Thus, on the one hand, a writ of certiorari is unwarranted here because the factual record arguably necessary to bring ALPA's procedure outside the condemnation of *Hudson* is deficient; and constitutional questions should never be decided in a factual vacuum.<sup>4</sup> *See, e.g., Abood v. Detroit Board of Educ.*, 431 U.S. 209, 236 n.33 (1977). On the other hand, a writ is not warranted because *Hudson* has already ruled adversely to ALPA on the fundamental constitutional question.

D. Finally, ALPA's claim that the issue of compelled arbitration "is a subject of squarely conflicting decisions among the Circuits," (Pet. at 11), is not well taken. As it must, ALPA concedes that most decisions of the courts squarely disallow compulsory arbitration of agency-fee disputes. (*See* Pet. at 13.) Given that these decisions arise in several different statutory contexts, their agreement on this point is significant:

- *Under 42 U.S.C. § 1983—Bromley v. Michigan Educ. Ass'n*, 82 F.3d 686, 694 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 682 (1997); *Hohe v. Casey*, 956 F.2d 399, 408-09, 413-14 (3d Cir. 1992); *Tierney v. City of Toledo*, 917 F.2d 927, 934-35, 939-40 (6th Cir. 1990); *Gibney v. Toledo Board of Educ.*, 532 N.E.2d 1300, 1303-05 (Ohio 1988); *see also Brosterhous v. State Bar*, 906 P.2d 1242, 1255-58 (Cal. 1995) (no exhaus-

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<sup>4</sup> This Court should wait for a case in which either "the arbitrator's selection [does] not represent the Union's unrestricted choice," *Hudson*, 475 U.S. at 308 n.21, in any sense, or in which there is a record as to whether or not a scheme such as ALPA's amounts in practice to such an "unrestricted choice."

tion required of attorneys challenging the amount of compulsory Bar dues).

- ***Under the National Labor Relations Act***—*Abrams v. Communications Workers*, 59 F.3d 1373, 1382 (D.C. Cir. 1995); *Food & Commercial Workers Local 951 v. Mulder*, 31 F.3d 365, 367-68 (6th Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995).
- ***Under the Railway Labor Act***—the District of Columbia Circuit's decision in this case. (App. at 4a-13a.)

The only decisions ALPA argues are favorable to its position are *Hudson v. Teachers Local 1*, 922 F.2d 1306 (7th Cir.), *cert. denied*, 501 U.S. 1230 (1991) ("*Hudson II*"), and *Lancaster v. ALPA*, 76 F.3d 1509 (10th Cir. 1996). (Pet. at 12-13.)

*Hudson II*, however, did *not* involve *any* question of nonunion employees being compelled to arbitrate a dispute over the amount of an agency fee. At issue was only the adequacy of the union's *notice* of its so-called "fair-share fee," not "the issue of the accuracy of the fee itself." See 922 F.2d at 1309. Indeed, in the District Court, the nonunion employees in *Hudson II* settled part of the case by agreeing to a stipulated judgment that gave them an option voluntarily to challenge the amount of the fee in the union's internal arbitration procedure. *Id.* at 1311.

On appeal, the Court of Appeals clearly stated the limited nature of the issue in *Hudson II*. Quoting this Court's holding in *Hudson* that "the constitutional requirements for the [union's] collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending," the Court of Appeals explained that "[t]he [nonunion employees'] attack focuses on the *first* requirement: an adequate explanation of the basis for the fee." *Id.* at 1313 (emphasis added) (quoting *Hudson*, 475 U.S. at 310). And the

question the court actually decided was "whether the *notice* gives the nonunion [employees] enough information to challenge the basis for the fee," and "sufficient information to enable the [employees] 'to decide whether there is any reason to mount a challenge'." *Id.* at 1314, 1316 (emphasis added).

So *Hudson II* is no precedent for ALPA's claim. As the Sixth Circuit concluded in *Bromley*, *Hudson II* "did not hold that exhaustion of the arbitral remedy could be required as a condition to the bringing of a § 1983 action." 82 F.3d at 694. Moreover, *if Hudson II* had held that exhaustion was required, it would have contradicted this Court's "categorical[ ]" holding that "exhaustion is not a prerequisite to an action under § 1983." *Patsy v. Board of Regents*, 457 U.S. 496, 500-01 (1982); see *Felder v. Casey*, 487 U.S. 131, 146-50 (1988).<sup>5</sup>

Although a bare precedent, *Lancaster* is highly unconvincing. First, *Lancaster* wrongly interpreted *Hudson II* as having "held [that] a dissenting employee must exhaust all available nonjudicial remedies." It then "conclude[d] that] the . . . holding in *Hudson II* was correct" and "adopt[ed] it as the law of th[e Tenth] Circuit." 76 F.3d at 1521-22. Thus, *Lancaster* not only stands on a misreading of *Hudson II*, but also goes against this Court's decisions in *Patsy* and *Felder*.

Second, *Lancaster* allowed the nonunion employee there to pursue his suit, though he had not exhausted the union's arbitration, because the union had earlier failed to provide a *Hudson* notice containing sufficient information about the nature of certain allegedly chargeable assessments. 76 F.3d at 1525-27. Thus *Lancaster* itself supports the conclusion that any case, such

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<sup>5</sup> It is hard to believe that, having been told by this Court in *Hudson* that "[t]he arbitrator's decision would not receive preclusive effect in any subsequent § 1983 action," 475 U.S. at 308 n.21, the lower courts on remand would cavalierly disregard that admonition, ignore *Patsy* and *Felder*, and require the nonunion employees to exhaust arbitration.

as this,<sup>6</sup> in which nonunion employees allege a defective notice (in addition to claims that an agency fee is unlawfully calculated) can properly begin in federal court. But why exhaustion of a union's arbitration scheme should come into play *after* a federal court has already asserted jurisdiction is not easy to imagine. *Cf. Beck v. Communications Workers*, 468 F. Supp. 87, 91 (D. Md. 1979) ("a stay pending exhaustion of the union rebate procedure would not be helpful in promoting the ultimate resolution of the controversy," because it "is extremely unlikely that exhaustion will substantially alter the positions of the parties").

In sum, as to its first issue, ALPA makes no case for a writ of certiorari.

**II. That a Federal Court Should Give No Deference to the Decision of a Union's "Impartial Decisionmaker" in an Agency-Fee Dispute Was Implicitly Decided in *Hudson*, and Ought Not to Be Revisited on the Record Here.**

ALPA's second issue is also not worthy of a writ of certiorari. Limited judicial review of arbitration awards is based on the principle that, "[b]ecause the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept." *United Paperworkers v. Misco, Inc.*, 484 U.S. 29, 37-38 (1987). That principle is inapplicable here, because the Pilots did not contract to have their dispute with ALPA settled by its arbitrator. (App. at 2a-3a.)

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<sup>6</sup> The Pilots alleged that ALPA's "1990 and 1991 statements [of chargeable and nonchargeable expenses] constituted inadequate notice under *Hudson* because they were not 'audited.'" (App. at 15a.) They also alleged that the 1992 statement was inadequate notice because the method by which the audit of that statement was done "violated generally accepted accounting principles." The Court of Appeals held that there was a genuinely disputed factual issue as to the latter claim. (*Id.* at 16a-19a.) Thus, even under *Lancaster*, exhaustion was not required here.

Moreover, ALPA concedes that *Hudson* has already ruled that an "arbitrator's decision would not receive preclusive effect in any subsequent . . . action" in federal court over an agency-fee dispute. (Pet. at 14 (quoting *Hudson*, 475 U.S. at 308 n.21).) Importantly, for this proposition *Hudson* cited *McDonald v. City of West Branch*, 466 U.S. 284 (1984).

*McDonald* held that, "in a § 1983 action, a federal court should not afford . . . collateral-estoppel effect to an award in an arbitration proceeding." 466 U.S. at 292. *McDonald* also described "a rule that would have required federal courts to *defer* to an arbitrator's decision" as one that would "*preclude* a subsequent suit in federal court." *Id.* at 288-89 (emphasis added). Thus, per *McDonald*, *Hudson*'s ban on deference to arbitration clearly embraces factual issues. *See McDonald*, 466 U.S. at 287 n.5 (collateral estoppel applies to issues of fact), 292 ("a federal court should not afford . . . collateral-estoppel effect to an [arbitrator's] award"), 292 & n.13 ("an arbitration proceeding cannot provide an adequate substitute for a judicial *trial*"; it "is the duty of courts to assure the *full* availability of th[e] judicial forum") (emphasis added).<sup>7</sup>

That *Hudson* arose under § 1983, whereas this case arises under the RLA, is immaterial. First, in both *Hudson* and here, the nonunion employees asserted First-Amendment rights. *Compare Hudson*, 475 U.S. at 306, with *Ellis v. Railway Clerks*, 466 U.S. 435, 455 (1984). Second, *McDonald* based its rejection of preclusion "in large part on [the] conclusion that Congress intended the statutes at issue . . . to be judicially enforceable and that arbitration could not provide an adequate substitute for judicial proceedings . . . under those statutes." 466 U.S. at 289. But, as this Court explained in *Communications Workers v. Beck*,

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<sup>7</sup> The judicial forum is not fully available where, as here, the District Court, contrary to Federal Rule of Civil Procedure 56, deferred to the arbitrator's resolution of genuinely disputed issues of material fact. (*See App.* at 19a-20a.)

"the RLA . . . leaves it to the courts to determine the validity of [union] activities challenged under the Act." 487 U.S. 735, 743 (1988).

A claim that a union exacts agency fees "beyond those necessary to finance collective-bargaining activities" alleges a breach of the DFR, over which federal courts have jurisdiction. *Id.* at 742-44. The RLA "contemplates resort to the usual judicial remedies . . . for breach of that duty." *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 207 (1944). Thus, just as with § 1983, the DFR interposes the federal courts as the guardians of individuals' rights. *Compare McDonald*, 466 U.S. at 290, with *Vaca v. Sipes*, 386 U.S. 171, 181-82 (1967).

ALPA argues, however, that *Hudson's* categorical statement nevertheless left open "deference [to the arbitrator's decision] short of 'preclusive effect,'" and that this "deference" should encompass acceptance of the arbitrator's "findings of fact . . . 'unless clearly erroneous.'" (Pet. at 14.) In support of this notion, ALPA cites only two opinions of district courts, *both of which were reversed on appeal*. (Pet. at 14-15.)

One (the District Court in this case) was reversed because the Court of Appeals rejected ALPA's whole theory of exhaustion, (App. at 4a-13a.); the other (a district court in Michigan), because the Court of Appeals rejected the union's "deference" argument on its demerits, *Bromley*, 82 F.3d at 692-95. ALPA's own showing thus belies its contention that this "question is independently important, and will continue to recur and cause confusion and needless litigation until it is finally resolved by this Court," (Pet. at 15).

### III. That Courts Should Determine Whether Auditors Have Properly Verified a Union's Agency-Fee Notice Was Implicitly Decided in *Hudson*, and Ought Not to Be Revisited on the Record in This Case.

*Hudson* ruled, as a matter of First-Amendment law, that in collecting agency fees "adequate disclosure [by the union] surely would include . . . verification by an independent auditor," i.e., an "independent audit." 475 U.S. at 307 n.18, 310 & n.23. ALPA claims that "the issue [of verification] has spawned extensive litigation in the federal courts." (Pet. at 15 & n.6.) But it nowhere denies that, in all that litigation, the courts have agreed on what "verification" means. Universally, "verification" under *Hudson* "must be what an accountant would do when undertaking an audit." *Hohe v. Casey*, 727 F. Supp. 163, 166 (1989), *final judgment*, 136 L.R.R.M. (BNA) 2198 (M.D. Pa. 1990), *aff'd in part, rev'd in part on other grounds*, 956 F.2d 399 (3d Cir. 1992); *see, e.g., Ferriso v. NLRB*, 156 L.R.R.M. (BNA) 2321, 2326-27 (D.C. Cir. Sept. 23, 1997); *Dashiell v. Montgomery County*, 925 F.2d 750, 756 (4th Cir. 1991).

ALPA contends that a court should limit its review of an auditor's verification of agency-fee calculations to issues of "fraud or intentional deception." (Pet. at 16-17.) It cites no authority for this, however. No such authority exists. As the Court of Appeals recognized, "*Hudson* did not stand for the proposition that a rubber stamp by an accountant stating 'this was audited' meets the constitutional minimum it envisioned." (App. at 18a.)

Moreover, the appropriateness of the accounting procedures and standards the auditor employs, are obvious questions of *fact*, which the federal courts have routinely recognized must be determined in an evidentiary hearing. *See Tierney v. City of Toledo*, 917 F.2d 927, 934, 936 (6th Cir. 1990); *Gwirtz v. Ohio Educ. Ass'n*, 704 F. Supp. 1481, 1482-83 (N.D. Ohio 1988), *aff'd*, 887 F.2d 678 (6th Cir. 1989), *cert. denied*, 494 U.S. 1080 (1990); *compare Hohe v. Casey*, 740 F. Supp. 1092, 1096

(summary judgment denied), *further proceedings*, 727 F. Supp. 163 (1989), *final judgment*, 136 L.R.R.M. (BNA) 2198 (M.D. Pa. 1990), *aff'd in part, rev'd in part on other grounds*, 956 F.2d 399 (3d Cir. 1992), *with id.*, 727 F. Supp. at 165-66.

Thus, nothing on the record here raises an issue of law worthy of a writ of certiorari concerning the Court of Appeals' decision to remand the verification issue for the district court to make independent factual findings, (App. at 17a-19a).

**IV. Except in Limited Circumstances in the Public Sector, This Court Has Consistently Held Lobbying of Government by a Union Not to Be Lawfully Chargeable to Objecting Nonunion Employees.**

ALPA's contention that this Court ought to find its lobbying activities chargeable to the Pilots, (Pet. at 17-22), is even less worthy of a writ of certiorari than its other claims.

This Court's decisions do not allow a union in the private sector to charge its lobbying to nonunion employees. The "*Beck* and *Ellis* holdings foreclose the exaction of mandatory agency fees for [legislative] activities." *Abrams*, 59 F.3d at 1380; *accord Beckett v. ALPA*, 59 F.3d 1276, 1281 (D.C. Cir. 1995) (Silberman, J., concurring); *see Ellis*, 466 U.S. at 447 ("those who objected could not be burdened with *any* part of the union's expenditures in support of political or ideological causes") (emphasis added); *Machinists v. Street*, 367 U.S. 740, 768-69 & n.17 (1961) (political and ideological activities, including "lobbying," not chargeable); *see also Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 516 (1991) (the Court's RLA cases "establish that, at least in the private sector, [lawfully chargeable] functions do not include political or ideological activities"). That unequivocal ban includes "[s]upport for or opposition to proposed, pending, or existing governmental executive orders, policies, or decisions." *Ellis v. Railway Clerks*, 91 L.R.R.M. (BNA) 2339, 2342-43 (S.D. Cal. 1976), *incorporated*, 108 L.R.R.M. (BNA) 2648 (S.D. Cal. 1980), *aff'd in part, rev'd in part on other grounds*, 685

F.2d 1065 (9th Cir. 1982), *aff'd in part, rev'd in part on other grounds*, 466 U.S. 435 (1984).<sup>8</sup>

In the public sector, some union lobbying may be chargeable to nonunion employees, because of "the inherently political nature of salary and other workplace decisions in public employment," and because of "[t]he dual roles of government as employer and policymaker" with respect to "ratification of negotiated agreements" and "appropriations for approved collective-bargaining agreements." *Lehnert*, 500 U.S. at 519-20. That is, in public-sector employment, collective bargaining and lobbying may often operationally amount to the same activity, because the employer is a governmental body.

Here, conversely, nothing in the record even faintly suggests that any of ALPA's lobbying is remotely analogous to what goes on in some public-sector situations—nor could it. The employers with whom ALPA negotiates have no "dual roles"; and, the "salary and workplace decisions" with which they concern themselves are not "inherently political" in nature. Where, as here, lobbying relates merely to "support of the employee's profession . . . , the connection to the union's function as bargaining representative is too attenuated to justify compelled support by objecting employees." *Id.* at 520.

Indeed, before this Court ALPA itself candidly describes its collective bargaining and its lobbying activities as conceptually separate and distinct from each other:

To the extent that ALPA *negotiates* directly with the airlines on matters relating to

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<sup>8</sup> *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997), is not to the contrary, as the Petition at 21 suggests. In the passage taken out of context by ALPA, *Glickman* was describing the holding of *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), "and the cases that follow it," i.e., the public-sector cases. *See Glickman*, 117 S. Ct. at 2139.

safety, no one disputes that the costs can be charged to agency-fee payers. The court of appeals held, however, that when ALPA pursues the same safety goals through *advocacy* before government agencies, it is engaging in "lobbying" and the costs cannot be charged to agency-fee objectors.

(Pet. at 19 (emphasis added).)<sup>9</sup>

Negotiation and contract administration are statutorily mandated procedures between employer and union under the RLA. Advocacy before government agencies is not. ALPA may be the Pilots' exclusive representative for dealing with their employer in bargaining and grievance handling. It is no representative of theirs at all, however, for advocacy to the government. Surely, it owes the Pilots no statutory duty to lobby any governmental agency on matters related to their employment. See *National Treasury Employees v. FLRA*, 800 F.2d 1165, 1166-71 (D.C. Cir. 1986) (2-1 decision); *Florey v. ALPA*, 439 F. Supp. 165, 169-70 (D. Minn. 1977), *aff'd*, 575 F.2d 673 (8th Cir. 1978). And, absent such a duty, it can assert no right to collect fees from them for such activities.

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<sup>9</sup> There is no "bright line between . . . general political activities" and "advocacy that concerns matters that directly impact the working conditions of employees that a union represents," as ALPA disingenuously suggests, (Pet. at 21). As the Court of Appeals recognized, under ALPA's theory, "virtually all of its political activities," including "lobbying for increased minimum wage laws or heightened government regulation of pensions[,] would also be germane." Moreover, even ALPA's "lobbying on safety-related issues" is not "somehow nonpolitical because all pilots share a common concern with these activities"; as the Court of Appeals also recognized, "it would certainly not be unexpected that pilots would have varying views as to the desirability of governmental regulation—including those regulations of airlines that pertain to safety." (App. at 14a.)

## CONCLUSION

ALPA presents no cogent reason for a writ of certiorari in this case. With respect to all issues ALPA has raised, the Court of Appeals' decision correctly followed the applicable decisions of this Court. ALPA suggests no conflict among the Courts of Appeals concerning the issues other than exhaustion of arbitration, and no real conflict exists concerning that issue. Therefore, ALPA's petition should be denied. If a writ of certiorari is granted, the Court of Appeals' decision should be summarily affirmed.

Respectfully submitted,

RAYMOND J. LAJEUNESSE, JR.  
*Counsel of Record*  
National Right to Work Legal  
Defense Foundation, Inc.  
8001 Braddock Road, Suite 600  
Springfield, VA 22160  
(703) 321-8510

PHILIP F. HUDOCK  
P.O. Box 3796  
Reston, VA 20195  
(703) 757-9577

ATTORNEYS FOR RESPONDENTS

October 31, 1997

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No. 97-428

CLERK

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1997

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AIR LINE PILOTS ASSOCIATION,  
*Petitioner,*  
v.

ROBERT A. MILLER, *et al.*,  
*Respondents.*

---

On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the District of Columbia Circuit

---

**PETITIONER'S REPLY BRIEF**

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JERRY D. ANKER  
(*Counsel of Record*)  
CLAY WARNER  
Air Line Pilots Association  
Legal Department  
1625 Massachusetts Avenue, N.W.  
Washington, D.C. 20036  
(202) 797-4087  
*Counsel for Petitioner*



588

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1997

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No. 97-428

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AIR LINE PILOTS ASSOCIATION,  
v. *Petitioner,*

ROBERT A. MILLER, *et al.,*  
*Respondents.*

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On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the District of Columbia Circuit

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Respondents' brief in opposition is devoted primarily to arguing the merits of the issues presented, and largely repeats arguments made in the opinion of the court of appeals below. We believe we have adequately addressed most of these matters in the petition. We do wish, however, to comment briefly on respondents' arguments with respect to the first two issues raised by the petition.

**I. THE EXHAUSTION ISSUE**

Respondents, like the court below, invoke the principle that a party who has not agreed to arbitration cannot be forced to submit to it. The "impartial decisionmaker" procedure at issue in this case, however, although often called "arbitration," is not arbitration in the conventional

sense. Ordinary arbitration is a voluntary procedure that both sides are free to accept or reject. The "impartial decisionmaker" procedure required by *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986), on the other hand, is mandatory, at least on the union. The question of whether agency-fee challengers must exhaust this procedure before bringing a lawsuit against the union therefore arises in a unique context, completely different from ordinary, voluntary arbitration.

Thus, the concurring justices in *Hudson*, who were certainly familiar with the law of arbitration, nevertheless expressed the view that an exhaustion requirement should apply to the "impartial decisionmaker" procedure mandated by that case. 475 U.S. at 311. Respondents' suggestion that the *Hudson* majority implicitly rejected this view is completely unfounded. Respondents attempt to draw that inference from the majority's footnote observation that any decision of the impartial decisionmaker "would not receive preclusive effect in any subsequent § 1983 action," 475 U.S. at 308 n. 21, but that statement was plainly concerned solely with safeguarding the challenger's right to go to court *after* the "impartial decisionmaker" procedure has been exhausted, not before. It is apparent that the *Hudson* majority simply chose not to address the exhaustion issue, since it was not presented on the facts before it.

Respondents also argue that any exhaustion requirement would violate Article III of the Constitution. If this argument had validity, then the *Hudson* decision itself would be inconsistent with the Constitution, for it plainly forces unions to submit agency-fee disputes to nonjudicial decisionmakers. If such an obligation can be forced on unions, surely it can also be forced on challengers. An exhaustion requirement would not in any way deprive such challengers of their ultimate right to bring an action in federal court; it would simply impose a procedural pre-

requisite to such a suit, no different from the exhaustion requirements that are imposed in many other contexts.

Nor are the cases dealing with the duty of fair representation (DFR) under the National Labor Relations Act, cited at page 5 of respondents' brief, relevant. The issue involved in those cases—whether the National Labor Relations Board has exclusive jurisdiction over DFR complaints under that statute—has absolutely nothing in common with the exhaustion issue in the present case.

Finally, respondents argue for the first time that the American Arbitration Association (AAA) procedure for selecting arbitrators in agency-fee cases, utilized by ALPA in this case, does not comport with the requirements of *Hudson*. This issue was not raised below and has no place before this Court. The AAA procedure utilized by ALPA is the same one that virtually every other union uses, and has been upheld by every court before which it has been challenged. See *Grunwald v. San Bernardino City Unified School Dist.*, 994 F.2d 1370, 1376-77 (9th Cir.), *cert. denied*, 510 U.S. 964 (1993); *Weaver v. University of Cincinnati*, 970 F.2d 1523, 1534-35 (6th Cir. 1992), *cert. denied*, 507 U.S. 917 (1993); *Ping v. National Educ. Ass'n*, 870 F.2d 1369, 1373 (7th Cir. 1989); *Andrews v. Education Ass'n of Cheshire*, 829 F.2d 335, 340 (2d Cir. 1987); *Damiano v. Matish*, 830 F.2d 1363, 1371 (6th Cir. 1987); *Kidwell v. Transportation Communications Int'l Union*, 731 F. Supp. 192, 204 (D. Md. 1990), *aff'd on other grounds*, 946 F.2d 293 (4th Cir. 1991), *cert. denied*, 503 U.S. 1005 (1992).

## II. THE DEFERENCE ISSUE

With respect to the issue of whether the decision of a *Hudson* impartial decisionmaker is entitled to any weight or deference in a subsequent court proceeding, respondents once again rely on arbitration law, arguing that because they did not agree to submit their complaints to the im-

partial decisionmaker, they cannot be bound by his decision. We have never contended, however, that the impartial decisionmaker's decision should be as binding and unreviewable as those of an arbitrator. The question, rather, is whether such a decision is entitled to any deference at all, at least with respect to questions of fact. Contrary to respondents' argument, this Court's statement in *Hudson* that the decisionmaker's decision "would not receive preclusive effect" does not settle the issue of whether it is entitled to any deference whatever.

If respondents are correct in their contentions concerning the exhaustion and deference issues, the result would be the following:

—Unions would be required to provide an impartial decisionmaker procedure, but agency-fee challengers would be free to invoke or ignore it as they pleased.

—If some challengers invoked the procedure while others proceeded directly to court, as occurred in this case, the union would be compelled to defend its agency-fee calculation in both forums simultaneously.

—If the impartial decisionmaker decided any issues in favor of the union, the challengers would be free to relitigate those issues *de novo* in a federal court.

—If the impartial decisionmaker decided any issues in favor of the challengers, there are two possible outcomes, neither of which makes much sense. Either the union would have the same right as the challengers to relitigate those issues *de novo*, which would make the entire procedure an absurdity because it is binding on no one, or the union would be bound even though the challengers are not, which would obviously be unfair.

We cannot believe the Court intended its decision in *Hudson* to lead to any of these results. Certainly a much more sensible and fair approach is the one adopted by the district court in this case, which provided limited review

of the fact-findings of the impartial decisionmaker (subject to a "clearly erroneous" standard) but *de novo* review of all issues of law.

In any event, only this Court can resolve these issues. The impartial decisionmaker procedure mandated by *Hudson* is unique in the law, and no real guidance can be found in cases arising in other contexts. This Court, having mandated this procedure, should use this case to resolve both the exhaustion question and the question of what deference, if any, an impartial decisionmaker's findings should be given by the courts.

### CONCLUSION

For the reasons stated above and in the petition, the writ of certiorari should be granted.

Respectfully submitted,

JERRY D. ANKER

(Counsel of Record)

CLAY WARNER

Air Line Pilots Association

Legal Department

1625 Massachusetts Avenue, N.W.

Washington, D.C. 20036

(202) 797-4087

Counsel for Petitioner

5  
No. 97-428

Supreme Court, U.S.

FILED

JAN 9 1998

IN THE  
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OCTOBER TERM, 1997

AIR LINE PILOTS ASSOCIATION,  
*Petitioner,*  
v.

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*Respondents.*

On Writ of Certiorari to the  
United States Court of Appeals  
for the District of Columbia Circuit

JOINT APPENDIX

JERRY D. ANKER \*  
CLAY WARNER  
Air Line Pilots Association  
1625 Massachusetts Avenue, N.W.  
Washington, D.C. 20036  
(202) 797-4087  
*Counsel for Petitioner*

\* Counsel of Record

RAYMOND J. LAJEUNESSE, JR.\*  
National Right to Work Legal  
Defense Foundation, Inc.  
8001 Braddock Road, Suite 600  
Springfield, VA 22160  
(703) 321-8510

PHILIP F. HUDOCK  
P.O. Box 3796  
Reston, VA 20195  
(703) 757-9577  
*Counsel for Respondents*

PETITION FOR CERTIORARI FILED SEPTEMBER 5, 1997

CERTIORARI GRANTED NOVEMBER 26, 1997



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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

1:91CV3161

Filed: 12/12/91

MILLER, *et al.*,

v.

AIR LINE PILOTS ASSO., *et al.*

## RELEVANT DOCKET ENTRIES

DATE		PROCEEDINGS
12/12/91	1	COMPLAINT filed summons (4) issued; EXHIBITS (3) (adc) [Entry date 12/18/91]
12/12/91	2	MOTION by plaintiff ROBERT A. MILLER for preliminary injunction (adc) [Entry date 12/18/91]
12/31/91	7	ORDER by Judge Norma H. Johnson : denying motion for preliminary injunction [2-1] by ROBERT A. MILLER (N) (cjp) [Entry date 01/07/92]
1/21/92	13	MEMORANDUM OPINION by Judge Norma H. Johnson (N) (dot) [Entry date 01/30/92]
1/23/92	10	ANSWER to the complaint for defendant AIR LINE PILOTS ASSO (dot) [Entry date 01/24/92]
2/21/92	—	STATUS HEARING before Judge Norma H. Johnson : discovery due 6/30/92 ; dispositive motions due 7/31/92 ; trial set for 2:00 11/17/92 ; case referred to Magistrate Judge for discovery and pretrial; pretrial to be held by 11/6/92. reporter: G. Williams (ab)

DATE	PROCEEDINGS
7/29/92	22 MOTION filed by defendant AIR LINE PILOTS ASSO for summary judgment attachments (5) (dmb) [Entry date 07/30/92]
7/31/92	23 MOTION filed by plaintiff(s) for summary judgment attachments (6) (dmb) [Entry date 08/03/92]
10/8/92	37 MOTION filed by plaintiff(s) ROBERT A. MILLER, plaintiff(s) DONALD PEDRAZZINI, plaintiff(s) KENNETH SHACKELFORD, plaintiff(s) ROBERT V. ZIMINSKY, plaintiff(s) BRUCE R. BOOHER for leave to file amendment to complaint EXHIBITS (amendment to complaint) (dcn) [Entry date 10/09/92]
2/19/93	55 MOTION filed by plaintiff(s) to re-open discovery (dmb) [Entry date 02/23/93]
8/2/93	58 ORDER by Judge Norma H. Johnson: granting motion to re-open discovery [55-1] by ROBERT A. MILLER, DONALD PEDRAZZINI, KENNETH SHACKELFORD, ROBERT V. ZIMINSKY, BRUCE R. BOOHER (N) (bm)
8/2/93	60 MEMORANDUM OPINION by Judge Norma H. Johnson (N) (ab) [Entry date 08/03/93]
8/2/93	61 ORDER by Judge Norma H. Johnson : granting motion for leave to file amendment to complaint [37-1] by ROBERT A. MILLER, DONALD PEDRAZZINI, KENNETH SHACKELFORD, ROBERT V. ZIMINSKY, BRUCE R. BOOHER; directing that the amendment shall be Exhibit 1 of the plaintiff's motion which is deemed filed and served on the date of entry of this Order (N) (ab) [Entry date 08/03/93]

DATE	PROCEEDINGS
8/2/93	68 AMENDMENT TO COMPLAINT by plaintiff(s) adding amending complaint [1-1] (dmb) [Entry date 10/21/93]
8/3/93	62 NOTICE by defendant AIR LINE PILOTS ASSO of suggestion of mootness of issues relating to audit of SGNE (dmb) [Entry date 08/04/93]
1/10/94	72 MOTION filed for TED M. ABBOTT and 141 pilots as plaintiffs to intervene; EXHIBIT (SECOND AMENDMENT TO THE COMPLAINT) (dmb) [Entry date 01/11/94]
1/21/94	73 MOTION filed by plaintiff(s) BRUCE R. BOOHER, plaintiff(s) ROBERT V. ZIMINSKY, plaintiff(s) KENNETH SHACKELFORD, plaintiff(s) DONALD PEDRAZZINI, plaintiff(s) ROBERT A. MILLER for preliminary injunction; exhibits (4) (cjp) [Entry date 01/26/94]
1/21/94	75 RESPONSE by defendant AIR LINE PILOTS ASSO in opposition to motion for preliminary injunction [73-1] by ROBERT A. MILLER, DONALD PEDRAZZINI, KENNETH SHACKLEFORD, ROBERT V. ZIMINSKY, BRUCE R. BOOHER.; attachments (A-J) (dmb) [Entry date 01/26/94] [Edit date 01/31/94]
1/21/94	77 SUPPLEMENTAL MEMORANDUM to motion for TED M. ABBOTT and 141 pilots as plaintiffs to intervene [72-1] (dmb) [Entry date 01/27/94]
1/24/94	142 ORDER by Judge Norma H. Johnson : denying motion for preliminary injunction [73-1] by ROBERT A. MILLER, DONALD PEDRAZZINI, KENNETH SHACKELFORD, ROBERT V. ZIMINSKY, BRUCE R. BOOHER (N) (jeb) [Entry date 03/13/96]

DATE	PROCEEDINGS
10/17/94 82	NOTICE OF FILING by defendant AIR LINE PILOTS ASSOCIATION of Arbitration Award; attachments (2). (tth) [Entry date 10/18/94]
19/27/94 83	MOTION filed by plaintiff DONALD PEDRAZZINI to withdraw as a party plaintiff (ted) [Entry date 10/28/94]
11/23/94 —	STATUS HEARING held before Judge Norma H. Johnson : discovery due 2/10/95 ; dispositive motions due 3/17/95 ; trial set for 10:00 5/15/95 ; pretrial to be held on or before 5/1/95 Reporter: Gloria Williams (adc) [Entry date 11/28/94]
12/8/94 86	ORDER by Judge Norma H. Johnson : that defendant ALPA's suggestion of mootness be, and hereby is denied, the claims of plaintiff Donald Pedrazzini be, and hereby are, dismissed with prejudice and granting in part, denying in part motion for TED M. ABBOTT and 141 pilots as plaintiffs to intervene [72-1] (N) (adc) [Entry date 12/09/94]
12/8/94 88	INTERVENOR'S COMPLAINT by intervenor-plaintiff TED M. ABBOTT, et al., against defendant DELTA AIR LINES, INC, defendant AIR LINE PILOTS ASSO . (ted) [Entry date 12/20/94]
2/22/95 98	MOTION filed by defendant AIR LINE PILOTS ASSO for summary judgment; Exhibit (ted)
2/22/95 99	ADMINISTRATIVE RECORD by defendant AIR LINE PILOTS ASSO; Exhibits (32), Hearing Transcript (Vols. 1-3) (ted)
4/28/95 117	MEMORANDUM OPINION by Judge Norma H. Johnson (N) (adc)
4/28/95 118	ORDER by Judge Norma H. Johnson : granting motion for summary judgment [98-1] by AIR LINE PILOTS ASSO as to issues 1,2,3 & 4 as listed on page 3 of the Memorandum

DATE	PROCEEDINGS
	Opinion issued on this date. It is further ordered that the parties submit further briefing on issue number 5: memorandum by defendant ALPA shall be due within 14 days; memorandum by plaintiffs shall be due 14 days thereafter; there shall be no replies. It is further ordered that Bruce R. Booher be, and hereby is, dismissed sua sponte as a plaintiff in this action. (N) (adc)
5/12/95 121	MOTION filed by defendant DELTA AIR LINES, INC to dismiss as to defendant DELTA AIR LINES, INC (ted) [Entry date 05/15/95]
7/12/95 124	ORDER by Judge Norma H. Johnson : granting motion to dismiss as to defendant DELTA AIR LINES, INC [121-1] by DELTA AIR LINES, INC, (N) (adc) [Entry date 07/13/95]
8/30/95 128	ORDER by Judge Norma H. Johnson : granting motion for summary judgment [22-1] by AIR LINE PILOTS ASSO (N) (dbw) [Entry date 08/31/95]
8/30/95 129	MEMORANDUM OPINION by Judge Norma H. Johnson (N) (dbw) [Entry date 08/31/95]
9/15/95 130	MOTION filed by plaintiff ROBERT V. ZIMINSKY, plaintiff KENNETH SHACKELFORD, plaintiff ROBERT A. MILLER to alter judgment, or to amend judgment (ted) [Entry date 09/18/95]
1/24/96 135	ORDER by Judge Norma H. Johnson : denying motion to alter judgment [130-1] by ROBERT A. MILLER, KENNETH SHACKELFORD, ROBERT V. ZIMINSKY, denying motion to amend judgment [130-2] by ROBERT A. MILLER, KENNETH SHACKELFORD, ROBERT V. ZIMINSKY (N) (adc) [Entry date 01/25/96]

DATE	PROCEEDINGS
2/22/96 138	NOTICE OF APPEAL by plaintiff ROBERT V. ZIMINSKY, plaintiff KENNETH SHACKELFORD, plaintiff ROBERT A. MILLER from order [135-1], order [128-1], order [124-1], order [118-1], order [86-1], order [76-1], order [59-1], order [58-1], order [7-1]. \$5.00 filing fee, \$100.00 docketing fee paid. Copy mailed to Jerry Anker. (tad) [Entry date 02/23/96]

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

96-7033

MILLER, ROBERT A., *et al.*,

v.

AIR LINE PILOTS ASSN.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
2/27/96	CIVIL-PRIVATE CASE docketed. Notice of Appeal filed by Appellant's Robert A. Miller, et al. [183434-1] (wmw)
10/17/96	CLERK'S ORDER filed granting motion for substitution of personal representative of deceased plaintiff-appellant Walter W. Baitis with Gerda H. Baitis [226631-1] Granting motion terminate party filed by Delta Airln Inc [229488-1]. (cwc)
10/29/96	MOTION filed (5 copies) by Appellants Thomas R. Allen, John M. Boland, Bruce R. Booher and Eugene C. Conway to withdraw as parties (certificate of service dated 10/29/96) [STYLED AS "STIPULATION FOR DISMISSAL."] (cwc)
11/1/96	BRIEF filed by Appellant's Robert A. Miller, et al., [233339-1]. Copies: 15. Certificate of service date 11/1/96. (jth)
11/1/96	APPENDIX (VOLUMES I & II) filed by Appellants Robert A. Miller, et al., [233340-1]. Copies: 10. Certificate of service date 11/1/96. (jth)

DATE	PROCEEDINGS
11/1/96	EXHIBITS filed by Appellant's Robert A. Miller, et al., [STYLED AS APPENDIX VOLUME III] [233344-1]. Copies: 4. Certificate of service date 11/1/96. (jth)
11/8/96	CLERK'S ORDER filed granting motion to withdraw as appellants filed by Thomas R. Allen, John M. Boland, Bruce R. Booher and Eugene C. Conway [233878-1]. (cwc)
12/3/96	BRIEF filed by Appellee Air Line Pilots Assn [238466-1] . Copies: 15 . Certificate of service date 12/3/96 . (wmw)
12/17/96	REPLY BRIEF filed by Appellant's Robert A. Miller, et al., [241298-1]. Copies: 15. Certificate of service date 12/17/96. (wmw)
1/16/97	ORAL ARGUMENT HELD before Silberman, Williams, Rogers . (ddm)
3/14/97	JUDGMENT for the reasons in the accompanying opinion reversing [259036-1]. Before Judges Silberman, Williams, Rogers. (edb)
3/14/97	OPINION ( 19 pages ) for the Court filed by Judge Silberman. (edb)
4/11/97	PETITION for rehearing [265528-1] and SUGGESTION, for rehearing in banc [265528-2] (19 copies) filed by Appellee Air Line Pilots Assn (c/s dated 4/11/97 ) (wmw)
4/22/97	CLERK'S ORDER filed that appellants respond hereto and do so on or before 5/07/97. (wmw)
5/6/97	OPPOSITION filed [270569-1] (5 copies) by Appellant's Robert A. Miller, et al., to the petition for rehearing and suggestion for rehearing in banc (certificate of service dated 5/6/97) (wmw)
6/10/97	PER CURIAM ORDER filed that the petition for rehearing be denied [265528-1]. (Mandate may issue on or after 6/18/97). Before Judges *Silber-

DATE	PROCEEDINGS
	man, *Williams, Rogers. A statement of Circuit Judge Silberman concurring in the denial of the petition, joined by Circuit Judge Williams, is attached. (wmw)
6/10/97	PER CURIAM ORDER, In Banc, filed that the suggestion for rehearing in banc be denied [265528-2]. Before Judges Edwards, Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel, *Garland. *Circuit Judge Garland did not participate in this matter. (wmw)

[Filed Dec. 12, 1991]

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 91 3161

ROBERT A. MILLER  
1111B N.W. 133 Street  
Vancouver, WA 98685;  
DONALD PEDRAZZINI  
741 Westminster Lane  
Los Altos, CA 94022;  
KENNETH SHACKELFORD  
71 Thaynes Canyon Drive  
Park City, UT 84060;  
ROBERT V. ZIMINSKY  
227 Campbell Mill Road  
Mason, NH 03033; and  
BRUCE R. BOOHER  
4910 N. East Meadows Drive  
Park City, UT 84060,  
*Plaintiffs,*  
v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,  
an unincorporated association  
1625 Massachusetts Avenue, N.W.  
Washington, D.C. 20036; and  
DELTA AIR LINES, INC.,  
a Delaware corporation  
C.T. Corporation System,  
Registered Agent  
1025 Vermont Avenue, N.W.  
Washington, D.C. 20005  
*Defendants.*

COMPLAINT

CLASS ACTION FOR DECLARATORY,  
EQUITABLE, AND INJUNCTIVE RELIEF

Plaintiffs are pilots who are currently employed by Defendant, Delta Air Lines, Inc. ("Delta"). Plaintiffs are either union members or former union members of Defendant, Air Line Pilots Association International ("ALPA"). Plaintiffs bring this Class Action challenging various aspects of a Railway Labor Act ("RLA") Union Security Agreement recently entered into between Delta and ALPA, which is to become effective on January 1, 1992. In support of this Complaint it is alleged as follows:

I. JURISDICTION

1. Jurisdiction lies in this Court pursuant to 28 U.S.C. Section 1331 (Federal question), 28 U.S.C. Section 1337 (regulating commerce), and 29 U.S.C. Section 412 ("LMRDA").

II. PARTIES

2. Defendant, Delta Air Lines, Inc. ("Delta"), is a Delaware corporation, which does business within the District of Columbia, and operates as a common carrier by air, engaged in interstate and foreign commerce. Pursuant to Section 201 of the Railway Labor Act ("RLA") (45 U.S.C. Section 181), Delta and its pilots and other employees are covered by the provisions of subchapter I (except Section 153) of the RLA (45 U.S.C. Section 151, *et seq.*) relating to applicable Federal Labor Law.

3. Defendant, Air Line Pilots Association International ("ALPA"), is an unincorporated association doing business in the District of Columbia, which maintains a principal office in that jurisdiction. ALPA is a "labor organization" (union) within the meaning of RLA. ALPA is the exclusive collective bargaining agent representing Delta's pilots and flight engineers relating to wages, hours, and working conditions, within the meaning of Section 2 of the RLA (45 U.S.C. Section 152).

4. Plaintiffs, Robert A. Miller, Donald Pedrazzini, Kenneth Shackelford, and Robert V. Ziminsky, are airline pilots currently employed by Delta. These Plaintiffs formerly were members of ALPA, but are not currently considered members in good standing, as defined by ALPA's Constitution and By-Laws. These Plaintiffs object to the Union Security Agreement, as described in this Complaint. These Plaintiffs shall be collectively referred to as the "Non-Union Pilots."

5. Plaintiff, Bruce R. Booher, is an airline pilot currently employed by Delta. Plaintiff Booher is a member of ALPA in good standing, as defined by ALPA's Constitution and By-Laws. This Plaintiff objects to the failure of ALPA to have a membership ballot prior to entry into a Union Security Agreement, as described in this Complaint. This Plaintiff shall be referred to as the "Union Pilot."

### III. CLASS ACTION ALLEGATIONS

6. The Non-Union Pilots bring this action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of themselves and all other non-union pilots and flight engineers who are employed by Delta and are thus in the collective bargaining unit, which is represented by ALPA.

7. The Union Pilot brings this action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of himself and all other union pilots and flight engineers who are employed by Delta and thus in the collective bargaining unit, which is exclusively represented by ALPA.

8. The Plaintiffs are suitable representatives of the two different classes: (1) the Delta non-union pilots and flight engineers.

9. The persons comprising those who are in the first class (Delta non-union pilots and flight engineers) are believed to be in excess of 1,000 individuals, who work

through numerous "bases" established by Delta throughout the country. The size of the class is so numerous that joinder of all members of the class is impractical.

10. The persons comprising those who are in the second class (Delta union pilots and flight engineers) are believed to be in excess of 6,000 individuals, who work through numerous "bases" established by Delta throughout the country. The size of the class is so numerous that joinder of all members of the class is impractical.

11. As to each class, the questions of law and fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair adjudication of this controversy.

12. The claims of the named Plaintiffs as representative parties are typical of the claims of the members of the classes.

13. The representatives of the classes will fairly and adequately protect the interests of those classes.

### IV. FACTUAL BACKGROUND

14. ALPA is a union which represents pilots and flight engineers who are employed by numerous airlines (including Delta), which operate in the United States (as well as provide foreign travel).

15. ALPA does not negotiate and maintain a "national" contract with multiple airlines. Rather, ALPA periodically negotiates an individual labor contract on behalf of the pilots and flight engineers who work for a single airline. The individual contract with an airline is actually negotiated through a Master Executive Council ("MEC"), which consists of the single airline involved.

16. The pay and work conditions vary substantially from airline to airline. The principal factor governing the contract with a particular airline is that airline's profitability.

17. Delta has been experiencing considerable growth and profitability for a number of years. Delta's pre-tax net income for the four year period ending June 30, 1990 was in excess of \$2 billion. In the last half of 1991 Delta acquired certain assets of Pan American Airlines, including its New York shuttle, some foreign routes, aircraft, and employees. Delta expects that this addition will position it well for significant profitability in the coming years.

18. Based on its prior profitability, Delta's union contract for flight employees contains the highest compensation schedule of any ALPA airline.

19. ALPA funds its activities by charging periodic dues, initiation fees, assessments, fines, penalties, and other charges to its members.

20. ALPA expends the income from its members to conduct a variety of activities. Some of the activities and expenditures are germane to the collective bargaining and employee grievance functions carried out by the union in the various collective bargaining units (i.e., each ALPA airline). Other activities and expenditures by ALPA are not germane to the collective bargaining representation function.

21. Pilots and flight engineers employed by Delta have not been required by law to become members of ALPA, as a condition of obtaining or maintaining employment with Delta. Legally, union membership by Delta flight personnel has been voluntary.

22. Those pilots and flight engineers employed by Delta who chose not to become union members, or not to remain in the union, paid no dues or other charges to ALPA.

23. ALPA, as the exclusive bargaining representative of the Delta pilots and flight engineers, is required under Federal Labor Law to negotiate a collective bargaining agreement and handle employee grievances for the benefit

of all employees (that is, both union members and non-union members).

24. ALPA is also required under Federal Labor Law to meet a duty of fair representation as to all Delta pilots and flight engineers (including non-union members covered by the collective bargaining agreement).

25. Section 2 Eleventh (a) of RLA (45 U.S.C. Section 152 Eleventh (a)), as interpreted by multiple decisions of the United States Supreme Court, permits a carrier (such as Delta) and a labor organization duly designated and authorized to represent employees (such as ALPA) to enter into a "Union Security Agreement," which requires, as a condition of continued employment, that each employee in the collective bargaining unit provide financial support to the union.

26. The amount of financial support of the union required of non-union members under the Union Security Agreement (as provided under RLA, and as interpreted by the United States Supreme Court) is that portion of the usual union dues, fees, and assessments (but not fines and penalties) which are germane to the collective bargaining activities of dealing with the employer on labor management issues.

27. On or about October 1, 1990, Delta entered into a collective bargaining agreement which, in its first paragraph, identifies the parties as follows:

"THIS AGREEMENT is made and entered into in accordance with the provisions of the Railway Labor Act, as amended, by and between DELTA AIR LINES, INC. (hereinafter known as the 'Company'), and the AIR LINE PILOTS in the service of DELTA AIR LINES, INC., as represented by the AIR LINE PILOTS ASSOCIATION, INTERNATIONAL (hereinafter known as the 'Association')." (Emphasis in original)

The October 1, 1990 Agreement continues in force through August 31, 1993, with subsequent renewals provided under RLA. On November 1, 1991, Delta entered into a Supplemental Agreement (to the Agreement of October 1, 1990). A copy of this Supplemental Agreement is attached as Exhibit 1 to this Complaint.

28. Of relevance here, the Supplemental Agreement adds a new Section 27 titled "Membership and Contract Maintenance," which purports to be a Union Security Agreement (also known as an Agency Shop), under Section 2 Eleventh of RLA, which will become effective on January 1, 1992 (the "Union Security Agreement"). The Union Security Agreement identifies as the parties Delta and the "Air Line Pilots in the service of Delta Air Lines, Inc., as represented by [ALPA]."

29. Plaintiffs, as set forth in this Complaint, seek to have this Court, under RLA, LMRDA, and the Declaratory Judgment Act (28 U.S.C. Section 2201, *et seq.*) declare the invalidity of this Agreement, enjoin its effectiveness, prevent the operation of an Agreement in violation of law, and establish lawful procedures for the future.

#### V. FIRST CAUSE OF ACTION (LACK OF AUTHORITY TO ENTER INTO AGREEMENT)

30. The allegations set forth in Paragraphs 1-29 are incorporated here.

31. In 1966, the Board of Directors of ALPA adopted a policy which called for the development of operating procedures manuals. Since 1966, ALPA has developed and expanded an Administrative Manual, which covers numerous aspects of operation of ALPA and the MECs. Section 40 of the Administrative Manual, titled "Representation" provides in Part 3.B—Agency Shop, the following provision which is in effect since the 1972 Board action on this subject:

"Where the number of non-union members on an airline represented by ALPA exceeds two percent of the pilots reflected on the Company's system Seniority List and after such time as a simple majority of the ballots returned by the membership of that airline has approved the provisions of an Agency Shop, ALPA shall negotiate an Agency Shop provision with such airline."

32. Section 90 describes in detail "ALPA Voting Procedures," including specific requirements that the voting shall be conducted by "SECRET BALLOT" and that various procedural safeguards shall be effectuated by the Election and Ballot Certification Board ("EBCB") to insure a fair ballot. Prior to entering into the Union Security Agreement on November 1, 1991, ALPA did not conduct a balloting of its membership, to obtain membership approval of the provisions of the Union Security Agreement (i.e., the "Agency Shop"). Instead of a secret ballot of the members, in accordance with ALPA procedure, ALPA entered into the Union Security Agreement with Delta, based solely on a 1988 non-secret Contract Questionnaire distributed to the then members of ALPA.

33. The action of ALPA in failing to ballot, as required by the Union, prior to entering into the Union Security Agreement constitutes a violation of the Bill of Rights of Members of Labor Organizations set forth in Section 101 of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRA," 29 U.S.C. Section 411). Plaintiffs who are Union pilots are entitled to the protection of the Union procedures and the Labor Bill of Rights.

34. The action of ALPA in failing to ballot, as required by the Union, prior to entering into the Union Security Agreement constitutes a violation of ALPA's duty of fair representation owed to the Plaintiffs who are Union Pilots and are Non-Union Pilots.

35. The Plaintiffs (Union and Non-Union) are entitled to a declaratory judgment and preliminary and permanent injunction, enjoining the effectiveness of the November, 1991, ALPA/Delta Union Security Agreement, because it was entered into without authority by ALPA.

36. The Plaintiffs (Union and Non-Union) are entitled to a further preliminary and permanent injunction, restraining ALPA from entering into any future Union Security Agreement with Delta without a prior ballot of ALPA members in good standing employed by Delta, which results in a majority of approval of the provisions of the Union Security Agreement.

WHEREFORE, Plaintiffs respectfully pray this Honorable Court enter an Order, certifying a class action, and grant the declarative and preliminary and permanent injunctive relief requested in this Cause of Action, and award the Plaintiffs their reasonable attorneys' fees and costs and expenses of litigation.

#### VI. SECOND CAUSE OF ACTION (DENIAL OF NON-UNION, PRE-AGREEMENT VOTING RIGHTS)

37. The allegations set forth in Paragraphs 1-36 are incorporated here.

38. The procedures of ALPA (stated in Paragraph 31 above) provide that only ALPA members, employed by a particular airline, are permitted to vote on the ballot of whether ALPA will enter into a Union Security Agreement with that particular airline.

39. Prior to ALPA entering into the ALPA/Delta Union Security Agreement on November 1, 1991, ALPA did not permit non-union pilots employed by Delta to participate in a ballot on the question of the Union Security Agreement, although Delta's non-union pilots are the persons who are most affected by a Union Security Agreement.

40. The denial to the Non-Union Pilots of an opportunity to vote on the Delta Union Security Agreement is a violation by ALPA of the duty of fair representation owed to the Non-Union Plaintiffs.

41. The Non-Union Plaintiffs are entitled to a declaratory judgment and preliminary and permanent injunction, enjoining the effectiveness of the November 1, 1991 ALPA/Delta Union Security Agreement, because it was entered into without an opportunity of the Non-Union Plaintiffs to ballot on the Union Security Agreement issue.

42. The Non-Union Plaintiffs are entitled to a further preliminary and permanent injunction, restraining ALPA from entering into any future Union Security Agreement with Delta without a prior ballot of Non-Union Pilots employed by Delta.

WHEREFORE, Plaintiffs respectfully pray this Honorable Court enter an Order, certifying a class action, and grant the declarative, and preliminary and permanent injunctive relief requested in this Cause of Action, and award the Plaintiffs their reasonable attorneys' fees and costs and expenses of litigation.

#### VII. THIRD CAUSE OF ACTION (DENIAL OF FUTURE VOTING RIGHTS)

43. The allegations set forth in Paragraphs 1-42 are incorporated here.

44. Section 27.A.9 of the ALPA/Delta Union Security Agreement (Exhibit 1) provides:

"It is understood and agreed that 90 days prior to the amendable date of this Agreement the Association shall cause a vote to be taken of all members in good standing at that time to determine if they desire that this membership provision continue in full force and effect for the balance of this Agreement and thereafter."

45. The Non-Union Plaintiffs are the individuals most affected by the Union Security Agreement. Yet they are denied the opportunity to vote on any future amendments relating to the Union Security Agreement, including the extension date of its operation. The exclusion of Non-Union Plaintiffs from this vote constitutes a denial of ALPA's duty of fair representation owed to Non-Union Plaintiffs.

46. The Non-Union Plaintiffs are entitled to a declaratory judgment, and preliminary and permanent injunction, enjoining the effectiveness of the November 1, 1991 ALPA/Delta Union Security Agreement, because it does not permit Non-Union employees of Delta from voting on any amendment to the Union Security Agreement.

47. The Non-Union Plaintiffs are entitled to a further preliminary and permanent injunction, restraining ALPA from entering into any future Union Security Agreement with Delta, which prevents Non-Union Plaintiffs from voting on any amendment to the Union Security Agreement.

WHEREFORE, Plaintiffs respectfully pray this Honorable Court enter an Order, certifying a class action, and grant the declarative, and preliminary and permanent injunctive relief requested in this Cause of Action, and award the Plaintiffs their reasonable attorneys' fees and costs and expenses of litigation.

#### VIII. FOURTH CAUSE OF ACTION (IMPERMISSIBLE COLLECTION OF MONIES FOR NON-GERMANE EXPENSES)

48. The allegations set forth in Paragraphs 1-47 are incorporated here.

49. Section 27.A.1 of the ALPA/Delta Union Security Agreement (Exhibit 1) provides that after January 1, 1992, Non-Union Pilots are required as a condition of continued employment with Delta:

"... to pay to the Association [ALPA] each month a service charge as a contribution for the administration of this Agreement and the representation of such employee. The service charge shall be an amount equal to the Association's regular and usual dues and including MEC assessments. In calculation of each non-member's monthly obligation, the Association shall allocate and adjust charges in the same manner as if followed with respect to its members."

50. The ALPA/Delta Union Security Agreement does not provide that Non-Union Pilots shall pay a collective bargaining service charge, under any circumstances, in an amount less than ALPA's "regular and usual dues and including MEC assessments."

51. ALPA's expenditures in the past, and in the future, will be partially germane to collective bargaining expenses and partially non-germane to such expenditures.

52. The United States Supreme Court, in interpreting union security agreements under RLA, has stated that:

"Before a union may compel dissenting employees to defray the cost of union expenses, it must meet its burden of showing that those expenses were 'necessarily or reasonably incurred for the purpose of performing the duties of an exclusive [collective bargaining] representative.' "

*Ellis v. Broth. of Ry., Airline and S.S. Clerks*, 104 S.Ct. 1883, 1898 (1984) (concurring opinion).

53. The ALPA/Delta Union Security Agreement, as written, is in violation of RLA, as interpreted by the United States Supreme Court. Both ALPA and Delta were fully aware when they entered into the Union Security Agreement of the Supreme Court decisions relating to Union Security Agreements under RLA, and that some of the ALPA expenditures are and will continue to be non-germane to collective bargaining costs.

54. Since entering into the Union Security Agreement, the Delta MEC of ALPA has distributed multiple flyers to Delta Pilots concerning the Union Security Agreement. Flyers 1, 2, and 3 are attached collectively as Exhibit 2 to this Complaint. These Flyers confirm that ALPA interprets the Union Security Agreement to require all Non-Union Pilots to pay the full union dues (2.35% of gross airline income) as a condition of further employment, as opposed to paying a lesser amount germane to collective bargaining costs.

55. Since entering into the Union Security Agreement, Delta has undertaken no steps to prevent the collection of monies for non-germane expenses from Non-Union Delta Pilots. In preparation for the January 1, 1992 effective date of the Union Security Agreement, ALPA has developed a series of form letters and flow diagrams related to enforcement of collection of full dues (2.35% of gross income) from non-union pilots and terminating the employment of all non-payees. Exhibit 3 consists of:

—An ALPA Delta MEC letter dated October 28, 1991 (which was sent with the Union Security Agreement to members), demanding payment of 2.35% of income to the union; and

—A flow diagram, showing termination of employment of non-payees.

56. The Non-Union Plaintiffs are entitled to a declaratory judgment, and preliminary and permanent injunction, enjoining the effectiveness of the November 1, 1991 ALPA/Delta Union Security Agreement, because the Agreement requires Non-Union Pilots to pay the full union dues and charges (2.35% of gross income), whether or not those monies are used for activities which are germane to collective bargaining.

57. The Non-Union Plaintiffs are entitled to a further preliminary and permanent injunction, restraining ALPA and Delta from entering into any future Union Security

Agreement, which does not limit monies collected from Non-Union Plaintiffs to those necessary to cover expenses germane to collective bargaining.

WHEREFORE, Plaintiffs respectfully pray this Honorable Court enter an Order, certifying a class action, and grant the declarative, and preliminary and permanent injunctive relief against ALPA and Delta, as requested in this Cause of Action, and award the Plaintiffs their reasonable attorneys' fees and costs and expenses of litigation.

#### IX. FIFTH CAUSE OF ACTION (ILLEGAL COLLECTION OF RETROACTIVE UNION FEES)

58. The allegations set forth in Paragraphs 1-57 are incorporated here.

59. The purpose of the Union Security Agreement under RLA is to prevent non-union employees of the collective bargaining unit from continuing as "free-riders" and require them to thereafter pay their fair share of union expenses germane to collective bargaining. Section 2 Eleventh of RLA provides that Union Security Agreement cannot be effective until the later of 60 days following employment or 60 days following the date of the Agreement. As the statute is written, a Union Security Agreement cannot be used to collect from any employee prior obligations to the Union (as a condition of continued employment).

60. Section 27.A.3. of the ALPA/Delta Union Security Agreement (Exhibit 1) provides that if, at the time of the implementation of the Agreement, a pilot is delinquent in the payment of fees, dues, or assessments, then if the delinquency continues, he/she shall be discharged by Delta.

61. ALPA and Delta are improperly utilizing the Union Security Agreement to collect for the benefit of ALPA union arrearages through the Union Security

Agreement, penalizing any non-payers with termination of employment.

62. All Plaintiffs, who are not current as to union payments as of January 1, 1992, and may be deemed by ALPA to be a member (whether or not the pilot deems him or herself to be a member) are entitled to a declaratory judgment, and preliminary and permanent injunction, enjoining the effectiveness of the November 1, 1991 ALPA/Delta Union Security Agreement, because the Agreement seeks to unlawfully collect union charges prior to the Agreement's effective date on penalty of termination of employment, all in violation of the RLA.

63. All Plaintiffs, who are not current as to union payments as of January 1, 1992, and may be deemed by ALPA to be a member (whether or not the pilot deems him or herself to be a member) are entitled to a further preliminary and permanent injunction, restraining ALPA and Delta from entering into any future Union Security Agreement which seeks to unlawfully collect union charges prior to the Agreement's effective date on penalty of termination of employment.

WHEREFORE, Plaintiffs respectfully pray this Honorable Court enter an Order, certifying a class action, and grant the declarative, and preliminary and permanent injunctive relief against ALPA and Delta, as requested in this Cause of Action, and award the Plaintiffs their reasonable attorneys' fees and costs and expenses of litigation.

#### X. SIXTH CAUSE OF ACTION (ILLEGAL GRIEVANCE PROCEDURE)

64. The allegations set forth in Paragraphs 1-63 are incorporated here.

65. Section 27.A.5. of the ALPA/Delta Union Security Agreement (Exhibit 1) establishes a grievance procedure under the Union Security Agreement to pilots who intentionally become delinquent on their service charge

payments and as a result of non-payment "is to be so terminated" from employment. Such a grievance procedure, which is conditioned on placing oneself in jeopardy of termination, prior to being eligible for relief, is unlawful under the duty of fair representation and the Due Process Clause of the United States Constitution.

66. Since the Union Security Agreement does not recognize the possibility of a Non-Union Pilot paying less than full dues as a collective bargaining service charge, the Agreement's grievance procedure (Section 27.A.5) offers no remedy to challenge the collection of monies for non-germaine expenditures, or to determine what constitutes non-germaine expenditures, all in violation of the duty of fair representation and the Due Process Clause.

67. ALPA contends that it has in effect certain policies and procedures concerning "agency fees" (that is, fees collected under a Union Security Agreement). These procedures are not part of ALPA's Administrative Manual.

68. ALPA's claimed agency fee procedure is a nullity, as a result of the express language of the Union Security Agreement, which does not recognize that Non-Union Pilots "service charge" can ever be less than the full Union dues and other charges (i.e., 2.35% of gross income).

69. ALPA does not provide any opportunity for Non-Union employees of airlines with Union Security Agreements to have any vote, control, or input as to ALPA's agency fee procedure. Thus, ALPA is free to modify, amend or discontinue its agency fee procedure at any time without remedy under the Union Security Agreement.

70. ALPA's agency fee procedure is not in compliance with the procedures required by the decisions of the United States Courts, interpreting Union Security Agreements under RLA and other Federal Labor Laws.

71. The Non-Union Plaintiffs are entitled to a declaratory judgment, and preliminary and permanent injunction,

enjoining the effectiveness of the November 1, 1991 ALPA/Delta Union Security Agreement, because:

—the Agreement fails to include adequate grievance procedures which can be invoked without incurring job jeopardy, and which permit a reasonable procedure to challenge collection of monies for non-germaine expenses and the determination of what is a germaine expense; and

—the ALPA agency fee procedure conflicts with the Agreement, is established without participation by Non-Union Pilots, and fails to comply with procedural standards established by Federal Court decisions.

72. The Non-Union Plaintiffs are entitled to a further preliminary and permanent injunction, restraining ALPA, and Delta from entering into any future Union Security Agreement, which does not provide for proper grievance procedures.

WHEREFORE, Plaintiffs respectfully pray this Honorable Court enter an Order, certifying a class action, and grant the declarative, and preliminary and permanent injunctive relief against ALPA and Delta, as requested in this Cause of Action, and award the Plaintiffs their reasonable attorneys' fees and costs and expenses of litigation.

#### XI. SEVENTH CAUSE OF ACTION (NON-GERMAINE EXPENDITURES)

73. The allegations set forth in Paragraphs 1-72 are incorporated here.

74. The United States Supreme Court has limited the use of Non-Union Union Security Agreement payments to expenditures which are germaine to collective bargaining activities.

75. ALPA has in the past, and will in the future, collect from non-union pilots, including those at Delta,

monies for certain activities not germaine to collective bargaining.

76. Under the ALPA/Delta Union Security Agreement, ALPA intends to collect 2.35% of each Non-Union Pilots' gross airline income. The 2.35% is broken down into three major groups:

1.50% —to National ALPA;

.50% —to the Major Contingency Fund (referred to by ALPA as its War Chest)

.35% —to SMRA (Special MEC Reserve Account)

2.35% —Total

77. Article IX Section 14 of the ALPA Constitution and By-Laws authorizes the collection from members of a Major Contingency Fund (War Chest) of \$100,000,000, which is to be spent by ALPA's Board of Directors, as follows:

"The Major Contingency Fund shall not be utilized under any conditions as a source of funding for past or current budgeted operational expenses. Such Fund may be utilized only for the following purposes:

(1) To treat with issues of urgent concern that significantly and adversely affect the airline piloting profession and *which cannot be funded by normal Association budgeting practices and policies.*"

(Emphasis added)

78. Collective bargaining costs are normally budgeted operational expenses of ALPA. Therefore, under the ALPA Constitution and By-Laws, the Major Contingency Fund cannot be used for collective bargaining costs. Hence, the War Chest is not to be expended on matters germaine to collective bargaining.

79. ALPA also collects from all members (and seeks to collect here from non-members under the Union Secu-

rity Agreement) a Special Reserve Account. The Special Reserve Account is used by the MEC, when that MEC has a deficit balance in its spending limit, otherwise, the monies are transferred to the Major Contingency Fund (whenever the Fund is below \$25,000,000). Funds can also be transferred to the general reserves of ALPA. Monies not spent by the MEC or transferred to the War Chest are refunded to the payor.

80. Even if the Delta MEC does not have a deficit balance, there is no assurance that Delta pilots will receive a refund of their Special Reserve Account payments, since ALPA can transfer the Special Reserve Account money to the War Chest (and under certain conditions, to the general reserves of ALPA). The typical experience under ALPA is that Special Reserve Account refunds are minimal or none.

81. ALPA's expenditure of monies in the Special Reserve Account and the Major Contingency Fund (War Chest) is typically for expenditures not germane to collective bargaining.

82. Since monies collected for the War Chest and Special Reserve Account are obtained in advance of the determination of the purpose for which they will be used, such monies cannot be collected from Non-Union Pilots, because Non-Union Pilots' obligation is limited to payment of monies which are expected to be used only for germane purposes.

83. The portion of the monies which are paid directly to national ALPA are not all used for germane purposes, but most of such monies are categorized as such for the purposes of ALPA accounting.

84. The Non-Union Plaintiffs are entitled to declaratory judgment, and preliminary and permanent injunction, enjoining the effectiveness of the November 1, 1991 ALPA/Delta Union Security Agreement, because the Agreement requires Non-Union Pilots to pay monies to

the Major Contingency Fund, Special MEC Reserve Account and National ALPA for expenditures which are not germane to collective bargaining.

85. The Non-Union Plaintiffs are entitled to an accounting of the use of all Union funds and an advanced reduction of service charges, which limits Non-Union Pilots' charges to those portions of Union expenditures which are germane to collective bargaining.

86. In order to comply with the rights of Non-Union Pilots, they are entitled to receive periodic statements from the Union, disclosing the amounts they may pay for the next billing period, in two alternative amounts:

—the monies due if the pilot wishes to voluntarily pay the same dues owed by members; and

—the monies due if the pilot wishes to limit the payment to monies for expenses germane to collective bargaining.

WHEREFORE, Plaintiffs respectfully pray this Honorable Court enter an Order, certifying a class action, and grant the declarative, and preliminary and permanent injunctive relief, and accounting relief against ALPA, as requested in this Cause of Action, and award the Plaintiffs their reasonable attorneys' fees and costs and expenses of litigation.

Dated: December 10, 1991

Respectfully submitted,

/s/ Philip F. Hudock  
 PHILIP F. HUDOCK, ESQ.  
 Attorney for Plaintiffs  
 Bar No. 6130  
 Suite 600  
 8150 Leesburg Pike  
 Vienna, Virginia 22182  
 (703) 833-8242

## [EXHIBIT 1]

SUPPLEMENTAL  
AGREEMENT

between

DELTA AIR LINES, INC.

and

THE AIR LINE PILOTS

in the Service of

DELTA AIR LINES, INC.

as Represented by

THE AIR LINE PILOTS ASSOCIATION  
INTERNATIONAL

THIS SUPPLEMENTAL AGREEMENT is made and entered into in accordance with the provisions of the Railway Labor Act, as amended, by and between DELTA AIR LINES, INC. (hereinafter known as the "Company"), and the AIR LINE PILOTS in the service of DELTA AIR LINES, INC., as represented by the AIR LINE PILOTS ASSOCIATION, INTERNATIONAL (hereinafter known as the "Association").

WHEREAS, the Company and the Association desire to amend the Pilot Working Agreement signed October 1, 1990,

NOW, THEREFORE, it is agreed that:

\* \* \* \*

## SECTION 27

## MEMBERSHIP AND CONTRACT MAINTENANCE

## A. Conditions

1. Each pilot of the Company covered by this Agreement who fails to voluntarily acquire and main-

tain membership in the Association shall be required, as a condition of continued employment, beginning sixty (60) days after the effective date of this Agreement or the completion of its probationary period, whichever is later, to pay to the Association each month a service charge as a contribution for the administration of this Agreement and the representation of such employee. The service charge shall be an amount equal to the Association's regular and usual dues and including MEC assessments. In calculation of each non-member's monthly obligation, the Association shall allocate and adjust charges in the same manner as if followed with respect to its members.

2. The provisions of this Section shall not apply to any employee covered by this Agreement to whom membership in the Association is not available upon the same terms and conditions as are generally applicable to any other pilot, or to any pilot to whom membership in the Association was denied or terminated for any reason other than the failure of the pilot to pay initiation (or reinstatement) fee, dues, and assessments uniformly required.
3. If a pilot covered by this Agreement is, at the time of implementation of this agreement delinquent, or becomes delinquent in the payment of fees, dues and assessments or the service charge as stated in Paragraph 1, above, the Association shall notify him by certified mail, return receipt requested, copy to the Vice President Flight-Operations of the Company, or designee, that he is delinquent and is subject to discharge as a pilot of the Company. Such letter shall also notify the pilot that he must remit the required payment within a period of fifteen (15) days or be discharged.

4. If, upon the expiration of the fifteen (15) day period, the pilot still remains delinquent, the Association shall thereafter certify in writing to the Vice-President-Flight Operations of the Company, or designee, copy to the pilot, that the pilot has failed to remit payment within the grace period allowed and is therefore to be discharged. The Vice President-Flight Operations or designee shall, within five (5) days, terminate the service of such employee as a pilot.
5. A grievance by a pilot who is to be so terminated as the result of an interpretation or application of the provisions of this Section shall be subject to the following procedure, which shall be exclusive of the provisions of Section 18 and 19 of this Agreement.
  - a. A pilot who believes that the provisions of Section 27 have not been properly interpreted or applied, as they pertain to him, may submit his request for review in writing within five (5) days from the date of receipt of notice by him. Such request must be submitted to the Vice President-Flight Operations of the Company or his successor or designee who shall review the protest and render a decision in writing with respect thereto not later than five (5) days following the receipt of the request of review.
  - b. The Vice President-Flight Operations of the Company or his successor or designee, shall forward his decision to the pilot with a copy to the official of the Association who shall promptly be designated in writing by the Association for this purpose. Said decision shall be final and binding on all interested parties unless appealed as hereinafter provided. If the decision is not satisfactory to either the

- pilot or the Treasurer of the Association, either may appeal the decision by filing a notice of appeal. Such notice shall be sent to the Company, to the other party and to the National Mediation Board within ten (10) days of the receipt of the decision and must contain a request for the National Mediation Board to provide a list of five (5) neutral referees. A neutral referee may be agreed upon by the pilot and the Association within ten (10) days after receipt of the list of neutral referees. If the parties cannot agree on a neutral referee, a referee, will be chosen from the panel supplied by the National Mediation Board. The alternate strike method shall be used to select a neutral referee with the pilot initiating the first rejection. Such final selection of a neutral referee shall be accomplished within ten (10) days after receipt of the list of neutral referees. If the parties have not reached agreement by the alternate strike method within the aforementioned ten (10) day period, the first name listed on the five (5) name panel provided by the National Mediation Board shall be designated the neutral referee.
- c. The decision of the neutral referee shall be requested within thirty (30) days after the hearing of the appeal unless otherwise agreed by the pilot and the Association and shall be final and binding on all parties to the dispute. The fees, charges and other reasonable expenses of such neutral referee shall be paid equally by the pilot and the Association.
  6. During the period a grievance is being handled under the provisions of this Section and until

final award by the Vice President-Flight Operations, his designee, or the neutral referee, the pilot shall not be discharged from the Company nor lose any seniority rights because of non-compliance with the terms and provisions of this Section.

7. A pilot discharged by the Company under the provision of this Paragraph shall be deemed to have been "discharged for cause" within the meaning of the terms and provisions of this Agreement.
8. It is agreed that the Company shall not be liable for any time, wage or all other claims (including discharge) of any pilot which may result from action taken by the Company pursuant to a written order by an authorized Association representative under the terms of this Paragraph or Agreement.
9. It is understood and agreed that 90 days prior to the amendable date of this Agreement the Association shall cause a vote to be taken of all members in good standing at that time to determine if they desire that this membership provision continue in full force and effect for the balance of this Agreement and thereafter.

\* \* \* \*

## SECTION 28

### DURATION AND EFFECT ON OTHER AGREEMENTS

Section 28.A.2 is amended to read:

The Agreement signed October 1, 1990, all Supplemental Agreements attached thereto, and all Supplemental and Transition Agreements signed \_\_\_\_\_, except as amended by this Supplemental Agreement signed

\_\_\_\_\_, shall continue in full force and effect through December 31, 1994 and shall renew itself without change through each succeeding December 31 thereafter unless written notice of intended change is served in accordance with Section 6, Title I of the Railway Labor Act, as amended, by either party hereto, at least sixty (60) days prior to December 31 in any year.

IN WITNESS WHEREOF, the parties hereto have signed this Supplemental Agreement this 1st day of November, 1991.

FOR DELTA AIR LINES, INC.

FOR THE AIR LINE PILOTS IN THE  
SERVICE OF DELTA AIR LINES, INC.

/s/ R. W. Allen  
R. W. ALLEN, Chairman  
and Chief Executive Officer

/s/ J. R. Babbitt  
J. R. BABBITT, President  
Air Line Pilots Association

/s/ W. W. Hawkins  
W. W. HAWKINS, President  
and Chief Operating Officer

WITNESS:

WITNESS:

/s/ M. W. Worth  
M. W. WORTH

/s/ R. D. Shelton  
R. D. SHELTON

/s/ R. A. McClelland  
R. A. MCCLELLAND

/s/ R. O. Norris  
R. O. NORRIS

/s/ H. C. Alger  
H. C. ALGER

/s/ G. S. Holm  
G. S. HOLM

/s/ H. D. Greenberg  
H. D. GREENBERG

/s/ R. H. Drew  
R. H. DREW

/s/ A. L. Beck  
A. L. BECK

/s/ W. C. Spalding  
W. C. SPALDING

[Filed Jan. 23, 1992]

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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[Title Omitted]

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**ANSWER OF DEFENDANT  
AIR LINE PILOTS ASSOCIATION**

Defendant Air Line Pilots Association (ALPA) answers the Complaint as follows:

*Response to Introductory Paragraph*

ALPA admits the first two sentences of the introductory paragraph of the Complaint. Responding to the third sentence, ALPA admits that plaintiffs filed this case as a class action but denies that class action status is proper.

*Response to Numbered Paragraphs*

Responding to the numbered paragraphs of the complaint, ALPA admits, denies, or otherwise avers as follows:

1. This paragraph states legal conclusions to which no response is required.
2. Admits the first sentence. The second sentence states legal conclusions to which no response is required.
3. Admits.
4. Admits.
5. Admits.
6. Denies that the Non-Union Pilots are entitled to bring this action under Rule 23 on behalf of the other

non-union pilots and flight engineers who are employed at Delta.

7. Denies that the Union Pilot is entitled to bring this action under Rule 23 on behalf of the other union pilots and flight engineers who are employed at Delta.

8. This paragraph states a legal conclusion to which no response is required but if deemed to be an allegation of fact it is denied.

9. Admits that there are in excess of 1,000 Delta non-union pilots and flight engineers but denies that these individuals constitute a class within the meaning of Rule 23.

10. Admits that there are in excess of 6,000 Delta union pilots and flight engineers but denies that these individuals constitute a class within the meaning of Rule 23.

11. This paragraph states a legal conclusion to which no response is required but if deemed to be an allegation of fact it is denied.

12. This paragraph states a legal conclusion to which no response is required but if deemed to be an allegation of fact it is denied.

13. This paragraph states a legal conclusion to which no response is required but if deemed to be an allegation of fact it is denied.

14. Admits.

15. Admits.

16. Admits that there are variations in pay and working conditions from airline to airline but denies that in all cases these differences are substantial. Denies the second sentence.

17. ALPA lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph except that ALPA admits the third sentence.

18. Admits that Delta's union contract for flight employees contains the highest compensation schedule of any ALPA airline but denies that this is based solely on its prior profitability.

19. Admits.

20. Admits the first sentence. In response to the next two sentences, ALPA states that the vast majority of its activities and expenditures are germane to collective bargaining, but admits that a small fraction of its activities and expenditures are not germane to collective bargaining.

21. Admits.

22. Denies. Some pilots and flight engineers employed by Delta who are not union members nonetheless have chosen to pay the equivalent of dues to ALPA.

23. This paragraph states legal conclusions to which no response is required.

24. This paragraph states legal conclusions to which no response is required.

25. This paragraph states legal conclusions to which no response is required.

26. This paragraph states legal conclusions to which no response is required.

27. Admits.

28. Admits.

29. Admits that plaintiffs are requesting the relief specified but denies that plaintiffs are entitled to such relief.

30. ALPA incorporates by reference its answers to paragraphs 1-29.

31. Admits, except that the first word of the quoted provision is "When" not "Where."

32. Denies the first sentence, because it purports to characterize a written provision that speaks for itself.

Denies the second and third sentences, except that ALPA admits that prior to entering into the Union Security Agreement on November 1, 1991, ALPA did not conduct a secret ballot vote but did poll its members by means of a written Questionnaire to which members did not have to sign their name.

33. This paragraph states a legal conclusion to which no response is required but if deemed to be an allegation of fact it is denied. ALPA admits that all union members are entitled to the protection of ALPA's procedures and all rights under law.

34. This paragraph states a legal conclusion to which no response is required but if deemed to be an allegation of fact it is denied.

35. This paragraph states a legal conclusion to which no response is required but if deemed to be an allegation of fact it is denied.

36. This paragraph states a legal conclusion to which no response is required but if deemed to be an allegation of fact it is denied.

37. ALPA incorporates by reference its answers to paragraphs 1-36.

38. Denies the characterization of ALPA's procedures. Section 40 of ALPA's Administrative Manual (referred to in Paragraph 31 of the Complaint) speaks for itself.

39. Admits that prior to entering into the ALPA/Delta Union Security Agreement on November 1, 1991, ALPA did not ballot the non-union pilots on the question of the Union Security Agreement, but denies that the non-union pilots are the persons most affected by a Union Security Agreement.

40. This paragraph states a legal conclusion to which no response is required but if deemed to be an allegation of fact it is denied.

41. This paragraph states a legal conclusion to which no response is required but if deemed to be an allegation of fact it is denied.

42. This paragraph states a legal conclusion to which no response is required but if deemed to be an allegation of fact it is denied.

43. ALPA incorporates by reference its answers to paragraphs 1-42.

44. Admits.

45. Denies the first sentence. Admits the second sentence. The third sentence states a legal conclusion to which no response is required but if deemed to be an allegation of fact it is denied.

46. This paragraph states a legal conclusion to which no response is required but if deemed to be an allegation of fact it is denied.

47. This paragraph states a legal conclusion to which no response is required but if deemed to be an allegation of fact it is denied.

48. ALPA incorporates by reference its answers to paragraphs 1-47.

49. Admits.

50. Denies. The language of the ALPA/Delta Union Security Agreement must be construed in light of applicable law and ALPA policies.

51. Admits that a small fraction of ALPA's past expenditures were used for purposes not germane to collective bargaining but denies the remainder of the paragraph. Plaintiffs' averment regarding future expenditures is speculative.

52. Denied. The quotation is not from the opinion of the Supreme Court but from Justice Powell's separate opinion concurring in part and dissenting in part, and is taken out of context.

53. The first sentence states a legal conclusion to which no response is required but if deemed to be an allegation of fact it is denied. ALPA admits the second sentence as to ALPA's awareness but lacks sufficient knowledge or information to form an opinion about Delta's awareness.

54. Admits the first two sentences. Denies the third sentence.

55. Admits the first sentence. Admits that in preparation for the January 1, 1991 effective date of the Union Security Agreement, ALPA developed a series of form letters and diagrams regarding the agency shop provision, some of which are included as Exhibit 3. Denies plaintiffs' characterizations of these documents and denies the remainder of the paragraph.

56. This paragraph states a legal conclusion to which no response is required but if deemed to be an allegation of fact it is denied.

57. This paragraph states a legal conclusion to which no response is required but if deemed to be an allegation of fact it is denied.

58. ALPA incorporates by reference its answers to paragraphs 1-57.

59. This paragraph states legal conclusions to which no response is required.

60. Denies, because Section 27.A.3 speaks for itself.

61. Denies.

62. This paragraph states a legal conclusion to which no response is required but if deemed to be an allegation of fact it is denied.

63. This paragraph states a legal conclusion to which no response is required but if deemed to be an allegation of fact it is denied.

64. ALPA incorporates by reference its answers to paragraphs 1-63.

65. Denies the first sentence because Section 27.A.5 speaks for itself. The second sentence states a legal conclusion to which no response is required but if deemed to be an allegation of fact it is denied.

66. This paragraph states a legal conclusion to which no response is required but if deemed to be an allegation of fact it is denied.

67. Admits the first sentence. Denies the second sentence.

68. Denies.

69. Denies.

70. This paragraph states a legal conclusion to which no response is required but if deemed to be an allegation of fact it is denied.

71. This paragraph states a legal conclusion to which no response is required but if deemed to be an allegation of fact it is denied.

72. This paragraph states a legal conclusion to which no response is required but if deemed to be an allegation of fact it is denied.

73. ALPA incorporates by reference its answers to paragraphs 1-72.

74. This paragraph states a legal conclusion to which no response is required.

75. Admits.

76. Denies first sentence. Non-members who object to paying for expenses not germane to collective bargaining are permitted to pay less than 2.35%. Admits the second sentence insofar as it applies to pilots who pay the full 2.35%.

77. Denies plaintiffs' characterizations of Article IX Section 14 of the ALPA Constitution because it speaks for itself.

78. Denies.

79. Denies plaintiffs' characterization of Section 16 of the ALPA Constitution because it speaks for itself. Admits that part of the dues or fees collected by ALPA are allocated to a Special Reserve Account.

80. Denies the first sentence, except ALPA admits that there is no assurance that Delta pilots will receive a refund of their Special Reserve Account payments. Denies the second sentence.

81. Denies.

82. Denies.

83. Denies, except that ALPA admits that not all of the monies paid directly to national ALPA are used for purposes germane to collective bargaining.

84. This paragraph states a legal conclusion to which no response is required but if deemed to be an allegation of fact it is denied.

85. This paragraph states a legal conclusion to which no response is required.

86. This paragraph states a legal conclusion to which no response is required but if deemed to be an allegation of fact it is denied.

#### *First Affirmative Defense*

87. The complaint fails to state a claim upon which relief can be granted.

#### *Second Affirmative Defense*

88. Plaintiffs have failed to exhaust the remedies available under ALPA's Policies and Procedures Applicable to Agency Fees.

*Third Affirmative Defense*

89. Plaintiffs lack standing to bring the claims in the Fifth Cause of Action (Illegal Collection of Retroactive Union Fees).

*Fourth Affirmative Defense*

90. The Union Plaintiff, Bruce R. Booher, lacks standing to bring the claims in the Second Cause of Action (Denial of Non-Union, Pre-Agreement Voting Rights); the Third Cause of Action (Denial of Future Voting Rights); the Fourth Cause of Action (Impermissible Collection of Monies for Non-Germane Expenses); and the Seventh Cause of Action (Non-Germane Expenditures).

WHEREFORE, having fully answered, ALPA prays that judgment be entered against plaintiffs and in favor of ALPA, and that ALPA be awarded its costs, including reasonable attorneys' fees.

/s/ Jerry D. Anker

JERRY D. ANKER

D.C. Bar No. 49726

SUZANNE L. KALFUS

D.C. Bar No. 430178

Air Line Pilots Association

Suite 702

1625 Massachusetts Avenue, N.W.

Washington, D.C. 20036

(202) 797-4087

Counsel for Defendant

Air Line Pilots Association

[Certificate of Service Omitted]

[Filed Aug. 2, 1993]

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

[Title Omitted]

**ORDER**

This matter comes before the Court on the motion of the plaintiffs to file an amendment to the complaint. Upon consideration of the motion, together with the supporting brief, the opposition of ALPA thereto, the Court finds that, in accordance with the provision in Rule 15(a) that leave to amend pleadings should be freely given when justice so requires, the motion should be allowed. The Court further finds that, since the matters in the amendment and the defendants' opposition thereto are part of the record on plaintiffs' motion for summary judgment, it appears unnecessary to require a responsive pleading from the defendants; however, because of the passage of time, the Court will permit a response from defendants, if desired.

It is, therefore, this 30th day of July, 1993,

ORDERED that the motion of the plaintiff for leave to file an amendment to the complaint be, and hereby is, GRANTED. The amendment shall be Exhibit 1 of the plaintiffs motion, which is deemed filed and served on the date of entry of this Order. The defendants shall be deemed to have generally denied the allegations in the amendment, and no responsive pleading to the amendment shall be required from the defendants.

/s/ Norma Holloway Johnson  
NORMA HOLLOWAY JOHNSON  
United States District Judge

[Filed Aug. 2, 1993]

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

\_\_\_\_\_  
[Title Omitted]  
\_\_\_\_\_

**AMENDMENT TO COMPLAINT**

Pursuant to Rule 15 and Local Rule 108(i), Plaintiffs amend their Complaint, as stated in this Amendment, by adding to the original Complaint the following:

\* \* \* \*

**XI. SEVENTH CAUSE OF ACTION  
(NON-GERMANE EXPENDITURES)**

86A. The Non-Union Plaintiffs are entitled to an "in dependent audit" by ALPA's independent CPA of the germane/non-germane calculation, prior to ALPA's use of such calculation to collect any monies from the Non-Union Plaintiffs.

86B. ALPA has not in the past, and does not intend in the future, to have a lawful "independent audit" of the germane/non-germane calculation it uses to collect monies from Non-Union Plaintiffs.

86C. In determining its germane/non-germane calculation, ALPA has not in the past, and does not intend in the future, to examine annually its expenditures in each project code, by qualified personnel, and with proper procedures, to insure the accuracy of the rebate calculation.

86D. ALPA contends that it is not required to allocate indirect costs between germane and non-germane expenditures in calculating the monies owed by Non-Union Plaintiffs under the Union Security Agreement.

86E. ALPA has not in the past, and does not intend in the future, to allocate, fairly and properly, indirect costs between germane and non-germane expenditures, in calculating the monies owed by the Non-Union Plaintiffs under the Union Security Agreement.

86F. ALPA has in the past, and intends in the future, to consider only expenditures (and not income) in its rebate calculation. Further, ALPA has typically not spent all of its revenue in the year of receipt. For example, ALPA's Major Contingency Fund (MCF) recently had revenues substantially in excess of current expenditures as follows:

Period	Excess Income
Calendar Year 1990	—\$8 million
Calendar Year 1991	—\$12 million
January-June 1992	—\$8 million

86G. ALPA has not in the past, and does not intend in the future, to rebate to Non-Union pilots 100% of unexpended monies (paid into various ALPA accounts).

86H. When unexpended funds are held in an account by ALPA after the end of a calendar year, ALPA does not attribute that money thereafter to the original payors, precluding future rebate of all such monies to the original payors, including the Non-Union Plaintiffs.

86I. Monies collected under Union Security Agreements may not be used, even temporarily, for non-germane purposes. ALPA's practices described in Paragraphs 86F, G and H constitute permanent use of Union Security Agreement monies for non-germane purposes.

86J. Since January 1, 1992 the Non-Union Plaintiffs have paid monies to ALPA pursuant to the Union Security Agreement, on threat of job termination, if payments were not made.

86K. As part of any ruling of this Court invalidating or enjoining (in whole or part) the operation of the Union Security Agreement, Non-Union Plaintiffs are entitled to a mandatory injunction requiring the refund to them of all monies paid to ALPA, with interest, and the enjoining of the payment of future monies, except as authorized under conditions established by this Court.

86L. The Non-Union Plaintiffs are entitled to a declaratory judgment, and preliminary and permanent injunction, requiring that any germane/non-germane calculation, collection or return of funds by ALPA shall be in accordance with the provisions set forth in Paragraphs 86A-K, including the requirement of an independent audit, the accurate determination of the rebate calculation, the proper allocation of indirect costs, the consideration of income in the rebate calculation, the 100% rebate of monies not expended on a current basis, and the avoidance of the use of monies for non-germane purposes, either temporarily or permanently.

WHEREFORE, Plaintiffs respectfully pray this Honorable Court enter an Order as requested in the original Complaint and as further requested in this Amendment to the Complaint.

\* \* \* \*

[Filed Jan. 10, 1994]

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

\_\_\_\_\_  
[Title Omitted]  
\_\_\_\_\_

**MOTION TO INTERVENE**

Pursuant to F.R.Civ.P. 24, this Motion to Intervene is filed on behalf of 142 pilots ("Applicants"), who seek to intervene as additional Plaintiffs in this agency shop, labor law litigation. In support of this motion, it is alleged as follows:

**I. PROCEDURAL BACKGROUND**

1. Pursuant to the Railway Labor Act ("RLA", 45 U.S.C. Section 151, *et seq.*), the original Plaintiffs (five union or nonunion pilots employed by Delta Air Lines, Inc.) initiated this agency shop litigation against their union, Air Line Pilots Association International ("ALPA"), and employer, Delta Air Lines, Inc. ("Delta").

2. The original Complaint raised procedural questions related to the agency shop agreement between ALPA and Delta, as well as challenges to the fees which are charged under agency shop by ALPA to nonunion pilots.

3. This Court, by Summary Judgment Order, entered July 30, 1993, resolved procedural questions in Causes of Action I, II, III, and V. Left unresolved were: Cause of Action IV (impermissible collection of monies for non-germane purposes based on the wording of the agency shop agreement), VI (illegal grievance procedures) and VII (charging for nongermane expenditures).

4. The original Complaint designated itself as a class action, and the named Plaintiffs filed a motion, pursuant to Rule 23, requesting certification as a class action. By Order dated July 30, 1993, this Court denied class certification (without specification of grounds).

## II. APPLICANTS

5. The persons who now seek intervention (Applicants) are 142 pilots employed by an airline for which ALPA is the collective bargaining representative. The name, address, employer, and union/nonunion status for each Applicant is set forth on Plaintiff's proposed Second Amendment to the Complaint, which is Exhibit 1 attached to this Motion.

6. 140 of the Applicants are pilots employed by Delta. These Applicants, of course, are in an identical position as the original Plaintiffs, related to each of the remaining issues in this litigation.

7. 2 Applicants are employed by USAir, Inc. ("USAir"). USAir is a common carrier by air, engaged in interstate and foreign commerce, and is subject (like Delta) to RLA. ALPA is the collective bargaining agent for USAir pilots (as it is for Delta pilots).

8. ALPA charges nonunion pilots employed by all of the airlines for which it is the collective bargaining agent the same agency shop fee. Therefore, the issues related to nongermane expenditures (the Seventh Cause of Action) are identical as to both Delta and USAir pilots.

9. ALPA uses the same agency shop grievance procedure for pilots employed by all of the airlines for which it is the collective bargaining agent. Therefore, the issues related to grievance procedures (the Sixth Cause of Action) are identical as to both Delta and USAir pilots.

10. The collective bargaining agreements between ALPA and Delta and between ALPA and USAir contain

comparable language, as to the agency shop provision, which is the subject of the Fourth Cause of Action. Both the Delta and USAir agency shop agreements provide for an agency shop fee (called a service charge) in an amount equal to ALPA's regular and usual dues and MEC (Master Executive Council) assessments charged union pilots (with no reference in either agreement that a nonunion pilot is allowed to pay less than a union pilot, i.e. for only germane expenditures). Therefore, the issues related to the language of the agency shop agreement (the Fourth Cause of Action) are identical as to both Delta and USAir pilots.

## GROUND TO INTERVENE

11. The ruling of this Court as to the Fourth, Sixth, and Seventh Causes of Action affects an interest that the Applicants have as to the subject of this action. Because a class action has been denied, Applicants interest in this matter may not be entitled to the benefits of the decision of this Court, unless they are able to intervene as party Plaintiffs. Further, because there is no class action, the original Plaintiffs may not be able to protect the interest of the Applicants, unless the Applicants can intervene themselves. Therefore, within the meaning of Rule 24(a)(2), Applicants are entitled to intervention as a right.

12. The Applicants' claims as to the issues in the Fourth, Sixth, and Seventh Causes of Action have common questions of law and fact with the original Plaintiffs. Indeed, the questions of law and fact are identical. Therefore, within the meaning of Rule 24(b), Applicants are entitled to permissive intervention.

13. At present, there is no discovery cutoff, no time limit set for dispositive motions, and no dates for either a pretrial conference or trial in this action. The intervention of the Applicants at this time will not delay the prosecution of this case; the Motion is thus "timely".

14. The Applicants adopt as their claims the allegations set forth in the original Complaint and the First Amendment to the Complaint (which was authorized by Order of this Court, dated July 30, 1993). The only additional allegations in the Applicants' claims are those set forth in Exhibit 1 of this Motion, which is proposed as the Second Amendment to the Complaint, and identifies:

- (a) The name and address of each Applicant;
- (b) The airline with which each Applicant is employed as a pilot;
- (c) The statement of whether the Applicant is a member of ALPA or a nonunion pilot; and
- (d) Allegations that USAir is an air carrier subject to the Railway Labor Act, that USAir pilots are currently represented by ALPA as their collective bargaining representative, and USAir has an agency shop agreement comparable to Delta's (as is pertinent to this Action).

WHEREFORE, pursuant to Rule 24, the Applicants respectfully request that this Court enter an Order:

- (a) authorizing the intervention of the Applicants as additional party plaintiffs;
- (b) directing that the Applicants' claim shall be as set forth in the original Complaint, the First Amendment to the Complaint authorized by Order of July 30, 1993, and the Second Amendment to the Complaint (which accompanies this Motion); and
- (c) finding that the Defendants shall not be required to file a response to the Second Amendment, but they may elect to file an answer thereto within 20 days of the entry of the Order of Intervention of this Court.

Respectfully submitted,

/s/ Philip F. Hudock, Esq.  
 PHILIP F. HUDOCK, ESQ.  
 Bar No. 6130  
 Counsel for Plaintiffs  
 Suite 600  
 8150 Leesburg Pike  
 Vienna, Virginia 22182  
 (703) 883-8242

Dated: January 7, 1994

[Filed Jan. 21, 1994]

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

\_\_\_\_\_  
[Title Omitted]  
\_\_\_\_\_

**MOTION FOR PRELIMINARY INJUNCTION**

Pursuant to F.R.Civ.P. 65 and Local Rule No. 205, Plaintiffs move this Court for a Preliminary Injunction, enjoining an Arbitration proceeding sought by Defendant, Air Line Pilots Association, International ("ALPA"), that will decide a core issue in this litigation, and will also usurp the jurisdiction of this Court. In support of this motion, it is alleged as follows:

**I. PROCEDURAL BACKGROUND**

**A. The Status of this Litigation**

1. Pursuant to the Railway Labor Act ("RLA", 45 U.S.C. Section 151, *et seq.*), Plaintiffs (five union or non-union pilots employed by Delta Air Lines, Inc.) initiated this Agency Shop litigation against their union, ALPA, and employer, Co-Defendant, Delta Air Lines, Inc. ("Delta"). The suit was filed in December 1991, shortly before Agency Shop became effective for Delta pilots (on January 1, 1992).

2. The Complaint raised both procedural and substantive questions related to the Agency Shop agreement between ALPA and Delta, as well as a challenge to the fees which are charged under Agency Shop by ALPA to nonunion pilots.

3. This Court, by Summary Judgment Order, entered July 30, 1993, resolved procedural questions in Causes of Action I, II, III, and V. Left unresolved were: Cause of Action IV (impermissible collection of monies for non-germane purposes based on the wording of the Delta

Agency Shop agreement), VI (illegal grievance procedures related to Agency Shop) and VII (a determination of the proper Agency Shop fees to be charged non-union pilots).

4. The Complaint designated itself as a class action, and the five named Plaintiffs requested certification as a class action. By Order dated July 30, 1993, this Court denied class certification (without specification of grounds).

5. Pending before this Court is a Motion to Intervene, filed on behalf of 142 pilots, who wish to become additional Plaintiffs, and obtain the benefits of this litigation (since class certification was denied).

6. There is no pre-trial conference scheduled or trial date in this litigation. ALPA has a motion pending requesting an immediate discovery cut-off. Plaintiff's oppose the discovery cutoff, but have requested a Status Call.

**B. The Current Status of the Delta Agency Shop Dispute**

7. Under the Agency Shop Agreement between ALPA and Delta, Delta non-union pilots have been required to pay an Agency Shop fee to ALPA since January 1, 1992 (or face termination of employment with Delta).

8. On June 15, 1993, ALPA completed its calculation of the Agency Shop fee that non-union pilots were to pay during 1992. This calculation is known as ALPA's Statement of Germane and Nongermane Expenses ("SGNE"). Pilots actually paid an Agency Shop fee during 1992 based on the 1990 and 1991 SGNE's.

9. Determination of the correct amount for the 1992 SGNE (i.e. the 1992 Agency Shop fee) is a core issue in this litigation (i.e. Cause of Action VII).

10. ALPA notified non-union pilots at the end of July, 1993 of the calculation of the 1992 SGNE.

11. The non-union Plaintiffs and other non-union pilots gave written notice to ALPA of their objection to the 1992 SGNE, and also noted that by the time ALPA advised of the 1992 SGNE it was too late (under ALPA's Agency Shop rules) to request arbitration for the 1992 SGNE. The named Plaintiffs and the other objecting pilots generally sent to ALPA a form letter, a copy of which is attached as Exhibit 1 (as sent by Robert A. Miller, the lead Plaintiff in this case).

12. Notwithstanding that it was too late for arbitration under ALPA's Agency Shop rules, ALPA proceeded to arrange for Arbitration with the American Arbitration Association ("AAA"), select an Arbitrator (Louis Aronin), and an arbitration site (AAA's Washington office).

13. These preparations for Agency Shop Arbitration caused pilots who objected to the 1992 SGNE to send another form letter to AAA, asking that arbitration be deferred, while a Motion to Intervene in this case was filed by objecting pilots. Attached as Exhibit 2 is a sample of the form letter (as sent by John M. Sharp, a Delta pilot who is included as an Applicant in the pending Motion to Intervene).

14. Neither ALPA nor ALPA agreed to defer arbitration. AAA recently sent a Notice of Arbitration, stating that the proceedings will begin on January 24, 1994. The Arbitration Notice is attached as Exhibit 3.

14. The Arbitrator has decided that in the arbitration:

- (a) there will be no discovery;
- (b) witnesses will not be identified prior to the hearing; and
- (c) exhibits will not be identified prior to the hearing.

15. ALPA's Agency Shop Procedures provide that a pilot "may" (not "must") request arbitration.

16. ALPA, although involved for many years in numerous Agency Shop disputes, has never had an arbitration which ruled upon any SGNE; all ALPA Agency Shop disputes have been in Federal Court.

17. ALPA's Agency Shop procedures provide that arbitration shall be "final and binding", thus precluding any opportunity for judicial review.

18. ALPA contends that arbitration must be exhausted before it is permissible for non-union pilots to begin Agency Shop litigation. ALPA raised this issue in its July, 1992 motion for Summary Judgment. The Court declined to rule on that question.

19. As recently as ALPA's Reply Brief in Support of a Motion to Close Discovery received by Plaintiffs' Counsel on January 14, 1994, ALPA stated it intends to renew its Motion to Dismiss this action, because arbitration has not preceded Agency Shop litigation.

20. Although ALPA's "arbitration-first" claim was raised in July of 1992 (in a Motion for Summary Judgment), this Court will not have ruled on the "arbitration first" claim until after the January 24, 1994 arbitration proceeding is completed.

21. Should this Court require arbitration, the original non-union Plaintiffs and the non-union Intervenors, may be estopped from challenging the 1992 SGNE, because the arbitration will have occurred, without their participation.

22. Plaintiffs and Intervenors will suffer irreparable damage, because their legal right to challenge Agency Shop fees will be denied them, although they began litigation in this Court to challenge Agency Shop fees over two years ago.

23. There is a substantial likelihood of success as to the Plaintiffs' claim that they are not required to participate in arbitration prior to filing Agency Shop litigation.

24. Further, the Arbitration will only address the single question of the SGNE for 1992, and none of the other legal issues raised in this litigation. Therefore, Arbitration is not a substitute for this litigation.

25. The grant of this Preliminary Injunction, only defers Arbitration, and does not bar it. Therefore, no substantial harm is sustained by anyone by the grant of the injunction.

26. The public interest is served by the grant of the injunction, so that this litigation may proceed efficiently, without the forfeiture of any legal rights by the Plaintiffs or Intervenors, and without the usurpation of the jurisdiction of this Court.

WHEREFORE, Plaintiffs respectfully request that this honorable Court enter an Order:

- (a) enjoining the proposed AAA arbitration sought by ALAP relating to the 1992 SGNE, until such time as this Court deems appropriate; and
- (b) granting such further relief as is appropriate.

Respectfully submitted,

/s/ Philip F. Hudock, Esq.  
 PHILIP F. HUDOCK, Esq.  
 Bar No. 6130  
 Counsel for Plaintiffs  
 Suite 600  
 8150 Leesburg Pike  
 Vienna, Virginia 22182  
 (703) 833-8242

Dated: January 18, 1994

# EXHIBIT 1

August 26, 1993

## CERTIFIED MAIL

*Return Receipt Requested*

W. John Donnelly, Vice President of Finance  
 Air Line Pilots Association  
 1625 Massachusetts Avenue, N.W.  
 Washington, D.C. 20036

## RE: REQUEST FOR ARBITRATION

Dear Mr. Donnelly:

I am a nonunion pilot employed by Delta Air Lines, Inc., and have previously filed an objection to ALPA charging me for nongermane expenses for calendar year 1992.

I received the June 15, 1993 letter from you, stating that the 1992 SGNE was completed, and that my certified letter, requesting arbitration, "must be received at ALPA's offices within 30 days." Your letter was not mailed to me until more than 30 days after June 15, 1993, denying me any opportunity to request arbitration under ALPA Rules. Notwithstanding ALPA's misconduct in making it impossible for me to request arbitration, I still assert my right to challenge the 1992 SGNE.

Your letter states that my request "should state the particular grounds for the objection." Because only ALPA has access to its complete books and records, the U.S. Supreme Court requires me to merely state that I object to all 1992 nongermane expenditures and all 1992 non-expended income. I also object to the arbitration procedure, the denial of Court review of the arbitration, and the lack of any procedure for a common arbitration for all objecting Delta pilots.

This letter is sent to preserve my rights and without waiver of benefits I may have from the pending litigation of *MILLER, et al. v. ALPA, et al.* Civil Action No. 91-3161, in the U.S. District Court for the District of Columbia.

Sincerely,

/s/ Robert A. Miller  
**ROBERT A. MILLER**  
 1111B N.W. 133rd Street  
 Vancouver, WA 98685

## EXHIBIT 2

November 17, 1993

Ms. Donna T. Sankar  
 Senior Case Administrator  
 American Arbitration Association  
 1150 Connecticut Avenue, N.W.  
 6th Floor  
 Washington, D.C. 20036-4104

Re: 16 673 00277 93DS  
 Air Line Pilots Association  
 1992 Agency Fee Challenges

Dear Ms. Sankar:

I am a pilot employed by Delta Airlines, Inc. Earlier in the year, I wrote to ALPA objecting to the SGNE for 1992, and requested arbitration to resolve the dispute.

After consideration of my options, I have decided to join as a named plaintiff in the *Miller, et al. v. ALPA et al.* case currently being litigated in the United States District Court for the District of Columbia. As a result of this action, I am requesting that you not proceed with arbitration while the Court considers my intervention motion.

It is my understanding that I will not forfeit any of my rights to request arbitration on this issue or any other at a later date should I desire to do so.

Signed: /s/ John M. Sharp 11-20-93

Printed Name: John M. Sharp

Employee #: 014944

Mailed: 11-22-93

**EXHIBIT 3**

**AMERICAN ARBITRATION ASSOCIATION**  
 1150 Connecticut Avenue, N.W., 6th Floor  
 Washington, D.C. 20036-4104  
 Telephone: (202) 296-8510

To the parties:

Re: 16 673 00277 93DS  
 Airline Pilots Association  
 (Agency Fee Challenges—1992)  
 (170 Challengers)

**NOTICE OF HEARING**

Please Take Notice that a Hearing in the above-entitled Arbitration will be held at the Arbitration Tribunal of the American Arbitration Association,

At: AAA Offices, 1150 Connecticut Avenue, N.W.  
 Sixth Floor, Washington, D.C.

Date: January 24 and February 24, 1994

Time: 9:30 a.m.

Before: Louis Aronin, Esq.

Please attend promptly with your witnesses and be prepared to present your proofs.

Dated: January 5, 1994      **DONNA T. SANKAR**  
 Senior Case Administrator

Sent to: Arbitrator Louis Aronin  
 Union—Elizabeth Ginsburg, Esq.  
 170 Challengers

[Filed Jan. 21, 1994]

**IN THE UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF COLUMBIA**

\_\_\_\_\_  
 [Title Omitted]  
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**DECLARATION OF ELIZABETH GINSBURG**

Elizabeth Ginsburg declares under penalty of perjury:

1. I am an attorney employed by the Air Line Pilots Association (ALPA) in its Legal Department, and I am representing ALPA in the pending arbitration of challenges to its Statement of Germane and Nongermane Expenses (SGNE) for 1992. This arbitration proceeding has been initiated and conducted in accordance with ALPA's Policies and Procedures Applicable to Agency Fees, a copy of which is attached to this declaration as Exhibit A.

2. The 1992 SGNE was dated June 15, 1993, but administrative problems delayed its mailing to pilots until on or about July 26, 1993. Under ALPA policy, eligible agency shop fee payers have thirty days to challenge the SGNE. To allow for mailing time, ALPA accepted any requests for arbitration which were received by September 29.

3. As of September 29, ALPA had received 170 letters which appeared to be valid requests for arbitration by eligible pilots, including letters from the four plaintiffs in this case. Copies of plaintiffs' letters are attached to this declaration as Exhibit B.

4. On September 29, 1993, ALPA sent a letter to all eligible pilots, advising them that their challenge would be submitted to arbitration. Enclosed with this letter was

ALPA's request to the American Arbitration Association (AAA) to initiate an arbitration proceeding. A sample of this correspondence is attached to this declaration as Exhibit C.

5. Ms. Donna Sankar of the AAA acknowledged our request on October 15, 1993, and advised all parties that Louis Aronin had been appointed arbitrator for the matter. A copy of that letter is attached to this declaration as Exhibit D. A copy of the AAA "Rules for Impartial Determination of Union Fees" governing such arbitrations is attached to this declaration as Exhibit E.

6. On October 20, Philip Hudock wrote to the AAA to request that it delay the arbitration until the *Miller* litigation is concluded. Copies of his letter and of my response on behalf of ALPA, opposing any delay of the arbitration process, are attached to this declaration as Exhibits F and G.

7. On November 11, Mr. Hudock again wrote to the AAA, reiterating his request that the arbitration not proceed and asserting that he "could seek an injunction from the U.S. District Court to restrain the arbitration" should the AAA not voluntarily stay the proceedings. Copies of this letter and of my response on behalf of ALPA are attached as Exhibits H and I to this declaration.

8. In a November 22 letter forwarded to the parties and Mr. Hudock, Arbitrator Aronin ruled on a number of procedural questions that had been raised. With regard to the request for a stay, Arbitrator Aronin stated that "[u]nless, and until, the undersigned has been enjoined from proceeding we intend to schedule a hearing, or hearings, as we deem necessary, to obtain the necessary information to determine the propriety of the agency fee payments required of non-members." Copies of his letter and of Ms. Sankar's covering letter are attached to this declaration as Exhibit J.

9. On November 30, 1993, a conference call was initiated by Arbitrator Aronin between him, Mr. Hudock and myself. Arbitrator Aronin explained that he was ready to schedule the arbitration and wanted to know whether Mr. Hudock would represent any parties in the arbitration. Mr. Hudock was noncommittal as to his intentions should the arbitration go forward, reiterating his desire that the matter be stayed and threatening to seek an injunction if no stay was granted. Arbitrator Aronin then set the hearing to commence on January 19. Mr. Hudock inquired as to whether the arbitrator intended to permit discovery, to which Arbitrator Aronin responded in the negative. Contrary to Mr. Hudock's claim in his moving papers, I recall no discussion at all as to whether advance disclosure of witnesses or exhibits would be required. Moreover, at no time has Mr. Hudock or any party to the arbitration requested advance designation of witnesses or exhibits.

10. The arbitration subsequently was rescheduled to begin January 24 because of scheduling conflicts of ALPA witnesses. All parties have been notified in writing of the hearing dates. ALPA's witnesses have set aside those dates in anticipation of the arbitration, and ALPA is prepared and intends to go forward.

11. I am aware that a motion to intervene has been filed in this lawsuit. I have compared the list of proposed intervenors to the list of parties to the arbitration. At least 71 pilots remain parties to the arbitration and are not represented by Mr. Hudock.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Date 1/19/94

/s/ Elizabeth Ginsburg  
ELIZABETH GINSBURG

## EXHIBIT A

ALPA POLICIES AND PROCEDURES APPLICABLE  
TO AGENCY FEES

## OBJECTION PROCEDURES

1. Nonmembers who are required by contract to pay an agency fee to ALPA as a condition of their employment may object to the use of their fees for purposes that are not germane to collective bargaining. The procedure for submitting an objection is described in paragraph 2 below. Any nonmember who submits an objection in the proper manner will be granted an adjustment in his/her agency fee amount, by reduction and/or rebate, to insure that his/her payment will be used exclusively for purposes germane to collective bargaining.

2. A nonmember wishing to object must send a written notice to the Vice President of Finance, Air Line Pilots Association, 1625 Massachusetts Avenue N.W., Washington, DC 20036. Each objector must send a separate notice in a separate envelope. The notice must contain the objector's name, address and ALPA identification number. A notice of objection may be submitted at any time during the calendar year for which the objection is to apply, but if it is received after May 1, the objector will not receive an advance reduction, but will only receive a rebate after the close of the year. An objection will be valid only for the calendar year in which it is made. An objector may renew his/her objection by sending a notice to the Vice President of Finance during any calendar year in which he/she wishes his/her objection to apply. To insure proof of delivery, objectors are encouraged to use certified mail.

3. No objection under these procedures will be accepted from an ALPA member, and no ALPA member will be eligible for a dues reduction or rebate. ALPA members may express their objections to ALPA expendi-

tures through the democratic processes available to them under ALPA's Constitution.

CALCULATION OF GERMANE  
AND NONGERMANE EXPENDITURES

4. The Finance Department shall maintain ALPA's financial records in a manner that will permit a reasonably accurate identification of those categories of expenditure that are germane to collective bargaining and those that are not. ALPA's independent auditors will conduct an annual review of the operation of ALPA's system for recording expenses and allocating them to functional categories. After the close of each year, the Finance Department, under the direction of the General Manager and with the advice of the Legal Department, will prepare a "Statement of Germane and Nongermane Expenditures" which will disclose, in reasonable detail, the year's expenditures, segregating those that were germane to collective bargaining from those that were not.

5. The Statement of Germane and Nongermane Expenditures will be completed on or about June 15 of each year. Promptly thereafter, the Vice President of Finance will send the Statement of Germane and Nongermane Expenditures to each nonmember who is required to pay an agency fee to ALPA. Each such nonmember shall also receive a copy of these Policies and Procedures. The Statement of Germane and Nongermane Expenditures will also be sent to each member of ALPA's Board of Directors.

## FEE REDUCTION AND REBATE PROCEDURE

6. Beginning in 1992, the following procedures shall apply:

(a) *Escrow Account* ALPA shall deposit in an interest-bearing escrow account each year an amount equal to 1.5 times ALPA's estimate of its total agency fee re-

bate obligation for that year. ALPA shall base its estimate on the previous years' experience, budget projections for the current year and any other available information. All rebates shall be paid out of the escrow account.

(b) *Lump Sum Rebates* Promptly after the preparation of the Statement of Germane and Nongermane Expenditures each year, any objector who has already paid his/her current year's estimated agency fee obligation in full will receive a prompt rebate, with interest, based on the percentage of nongermane expenditures in the previous year as shown on the Statement of Germane and Nongermane Expenditures.

(c) *Reduction of Monthly Installments* Beginning in July of each year, any objector who is paying monthly installments based on a monthly Statement of Account will receive a billing credit against his/her current year's estimated agency fee. This billing credit will be equal to the percentage of nongermane expenditures of the previous year as shown on the latest Statement of Germane and Nongermane Expenditures. The billing of subsequent monthly installments will be reduced in consideration of the applied billing credit.

(d) *Rebates for Checkoff Payers and Late Objectors* Any objector who elects to pay his/her agency fee obligation by means of checkoff, and any objector whose notice of objection is received after May 1, will receive a rebate based on the percentage of nongermane expenditures shown in the Statement of Germane and Nongermane Expenditures for the current year. This rebate will be made promptly after June 15 of the following year.

(e) *Year-end Adjustments* Each year, after the Statement of Germane and Nongermane Expenditures for the previous year has been prepared, ALPA will compare the agency fee reduction implemented in that year with the actual ratio of germane to nongermane expenditures as

reflected on the Statement of Germane and Nongermane Expenditures for that year. If the fee reductions were insufficient, ALPA will promptly issue additional reductions, or in the case of objectors whose obligations are current, rebates with interest out of the escrow account. If the fee reductions were too large, the objectors will be billed for the excess amount. The objective of these adjustments will be to assure that the agency fee paid by each objector will be no more and no less than his/her prorata share of the germane expenditures for that year.

(f) *Income Information* If the Association does not receive a statement of the objector's income for the previous year from his/her airline before processing year-end adjustments and rebates, the objector will be asked to provide a W-2 form for that year. No rebate will be issued in the absence of a complete and accurate statement of the objector's income for the year during which he/she submitted an objection.

## ARBITRATION PROCEDURE

7. Any pilot who believes that ALPA has made an error in its application to him/her of the policies and procedures set forth above may request that his/her complaint be submitted to an independent arbitrator for hearing and decision. A request for arbitration shall contain a brief statement of the issue or issues to be arbitrated, and must be sent to the Vice President of Finance of ALPA by certified mail, return receipt requested, no later than 30 days after the event that is the basis for the complaint. If the pilot so requests, ALPA will place in escrow, pending the outcome of the arbitration, the portion of the pilot's agency fee that ALPA determines to be reasonably in dispute.

8. Unless the parties otherwise agree, the selection of the arbitrator, and the procedures of the arbitration, will be governed by the American Arbitration Association Rules for Impartial Determination of Union Fees. Each side

will bear its own costs of arbitration, including (but not limited to) any travel costs, lost pay and attorneys' fees. ALPA will pay all fees and expenses of the American Arbitration Association and the arbitrator, unless the pilot or pilots participating in the arbitration voluntarily elect to share those fees and expenses.

9. To the extent permitted by law, the decision of the arbitrator shall be final and binding on the parties.

## EXHIBIT B

August 18, 1993

## CERTIFIED MAIL

*Return Receipt Requested*

W. John Donnelly, Vice President of Finance  
Air Line Pilots Association  
1625 Massachusetts Avenue  
Washington, D.C. 20036

Re: Request for Arbitration

Dear Mr. Donnelly:

I am a nonunion pilot employed by Delta Air Lines, Inc., and have previously filed an objection to ALPA charging me for nongermane expenses, for calendar year 1992.

I received the June 15, 1993 letter from you, stating that the 1992 SGNE was completed, and that my certified letter, requesting arbitration, "must be received at ALPA's offices within 30 days." Your letter was not mailed to me until more than 30 days after June 15, 1993, denying me any opportunity to request arbitration under ALPA rules. Notwithstanding ALPA's misconduct in making it impossible for me to request arbitration, I still assert my right to challenge the 1992 SGNE.

Your letter states that my request "should state the particular grounds for the objection." Because only ALPA has access to its complete books and records, the U.S. Supreme Court requires me to merely state that I object to all 1992 nongermane expenditures and all 1992 non-expended income. I also object to the arbitration procedure, the denial of timely notice to seek arbitration, the denial of Court review of the arbitration, and the lack of any procedure for a common arbitration for all objecting Delta pilots.

This letter is sent to preserve my rights and without waiver of benefits I may have from the pending litigation of *Miller, et al. v. ALPA, et al.*, Civil Action No. 91-3161, in the U.S. District Court for the District of Columbia.

Sincerely,

/s/ Robert V. Ziminsky  
ROBERT V. ZIMINSKY  
101 Mason Road  
Brookline, NH 03033

#0344192  
DAL 009

August 23, 1993

*Certified Mail*

*Return Receipt Requested*

Mr. John Donnelly, Vice President of Finance  
Air Line Pilots Association  
1625 Massachusetts Avenue N.W.  
Washington, D.C. 20036

Re: Request for Arbitration

Dear Mr. Donnelly:

I am a nonunion pilot employed by Delta Air Lines, Inc., and have previously filed an objection to ALPA charging me for nongermane expenses for calendar year 1992.

I received the June 15, 1993 letter from ALPA, stating that the 1992 SGNE was completed, and that my certified letter, requesting arbitration, "must be received at ALPA's offices within 30 days." ALPA's letter was not mailed to me until more than 30 days after June 15, 1993, denying me any opportunity to request arbitration within 30 days of completion of the SGNE (as required by ALPA Rules). Notwithstanding ALPA's misconduct in making it impossible for me to request arbitration, I still assert my right to challenge the 1992 SGNE.

ALPA's letter states that my request "should state the particular grounds for the objection." Because only ALPA has access to its complete books and records, the U.S. Supreme Court requires me to merely state that I object to all 1992 nongermane expenditures and all 1992 non-expended income. The burden is on ALPA to prove the expenses are germane. I also object to the arbitration procedure, the denial of timely notice to request arbitration, the denial of Court review of the arbitration, and the lack of any procedure for a common arbitration for all objecting Delta pilots.

This letter is sent to preserve my rights and without waiver of benefits I may have from the pending litigation of *Miller, et al. v. ALPA, et al.*, Civil Action No. 91-3161, in the U.S. District Court for the District of Columbia.

Sincerely,

/s/ Donald Pedrazzini  
DONALD PEDRAZZINI

0447979  
DAL

Date: August 25, 1993

*Certified Mail*  
*Return Receipt Requested*

Vice President of Finance  
Air Line Pilots Association  
1625 Massachusetts Avenue N.W.  
Washington, D.C. 20036

Re: Request for Arbitration

Dear Sir:

I am a nonunion pilot employed by Delta Air Lines, Inc., and have previously filed an objection to ALPA charging me for nongermane expenses for calendar year 1992.

I received the June 15, 1993 letter from ALPA, stating that the 1992 SGNE was completed, and that my certified letter, requesting arbitration, "must be received at ALPA's offices within 30 days." ALPA's letter was not mailed to me until more than 30 days after June 15, 1993, denying me any opportunity to request arbitration within 30 days of completion of the SGNE (as required by ALPA Rules). Notwithstanding ALPA's misconduct in making it impossible for me to request arbitration, I still assert my right to challenge the 1992 SGNE.

ALPA's letter states that my request "should state the particular grounds for the objection." Because only ALPA has access to its complete books and records, the U.S. Supreme Court requires me to merely state that I object to all 1992 nongermane expenditures and all 1992 non-expended income. The burden is on ALPA to prove the expenses are germane. I also object to the arbitration procedure, the denial of timely notice to request arbitration, the denial of Court review of the arbitration, and the lack of any procedure for a common arbitration for all objecting Delta pilots.

This letter is sent to preserve my rights and without waiver of benefits I may have from the pending litigation of *Miller, et al. v. ALPA, et al.*, Civil Action No. 91-3161, in the U.S. District Court for the District of Columbia.

Sincerely,

/s/ Kenneth L. Shackelford  
 Print Name: Kenneth L. Shackelford  
 Address: 71 Thaynes Canyon Dr.  
 Park City, Utah 84060

August 26, 1993

**CERTIFIED MAIL**  
*Return Receipt Requested*

W. John Donnelly, Vice President of Finance  
 Air Line Pilots Association  
 1625 Massachusetts Avenue, N.W.  
 Washington, D.C. 20036

**RE: REQUEST FOR ARBITRATION**

Dear Mr. Donnelly:

I am a nonunion pilot employed by Delta Air Lines, Inc., and have previously filed an objection to ALPA charging me for nongermane expenses for calendar year 1992.

I received the June 15, 1993 letter from you, stating that the 1992 SGNE was completed, and that my certified letter, requesting arbitration, "must be received at ALPA's offices within 30 days." Your letter was not mailed to me until more than 30 days after June 15, 1993, denying me any opportunity to request arbitration under ALPA Rules. Notwithstanding ALPA's misconduct in making it impossible for me to request arbitration, I still assert my right to challenge the 1992 SGNE.

Your letter states that my request "should state the particular grounds for the objection." Because only ALPA has access to its complete books and records, the U.S. Supreme Court requires me to merely state that I object to all 1992 nongermane expenditures and all 1992 non-expended income. I also object to the arbitration procedure, the denial of Court review of the arbitration, and the lack of any procedure for a common arbitration for all objecting Delta pilots.

This letter is sent to preserve my rights and without waiver of benefits I may have from the pending litigation of *MILLER, et al. v. ALPA, et al.* Civil Action No. 91-3161, in the U.S. District Court for the District of Columbia.

Sincerely,

/s/ Robert A. Miller  
 ROBERT A. MILLER  
 1111B N.W. 133rd Street  
 Vancouver, WA 98685

# EXHIBIT C

AIR LINE PILOTS ASSOCIATION  
 1625 Massachusetts Avenue, N.W.  
 Washington, D.C. 20036  
 (703) 689-2270

September 29, 1993

Kevin L. Shaughnessey  
 R.R. 2—606 Croquette Circle  
 Rowell Hill  
 New London, NH 03257

Dear Mr. Shaughnessey:

ALPA has received your letter challenging the Statement of Germane and Nongermane Expenditures (SGNE) for 1992. Contrary to your assumption, ALPA measures the time for requesting arbitration of such challenges from the date on which the SGNE is mailed, not the date that appears on ALPA's cover letter. We also allow a reasonable additional time for receipt of the SGNE. Therefore, we are treating your letter as a timely request for arbitration. If this is not your desire, please let us know in writing as soon as possible and we will withdraw your name from the arbitration.

We have received letters like yours from a number of other pilots, and we have delayed responding until we are able to respond to all of them simultaneously.

In accordance with ALPA's practice, we will hold one consolidated arbitration proceeding. A copy of ALPA's request to the American Arbitration Association to appoint an arbitrator is enclosed.

Your letter states various objections to ALPA's arbitration procedure, none of which we believe to be valid.

However, you may assert these objections before the arbitrator if you wish.

Sincerely,

ELIZABETH GINSBURG  
Attorney

Enclosure

**AIR LINE PILOTS ASSOCIATION**

1625 Massachusetts Avenue, N.W.

Washington, D.C. 20036

(703) 689-2270

September 29, 1993

Ms. Donna T. Sankar  
Labor Supervisor  
American Arbitration Association  
1150 Connecticut Avenue, N.W.  
Sixth Floor  
Washington, D.C. 20036-4104

Dear Ms. Sankar:

The Air Line Pilots Association has received challenges to its 1992 agency shop fees on a variety of grounds from the pilots listed in the attached Appendix. These challenges are subject to arbitration under the AAA's Rules for Impartial Determination of Union Fees. We request that an arbitrator be appointed in accordance with those Rules. We also request that proceedings in this matter be held in the Washington area, where ALPA's attorneys and staff are located and where all the relevant records are stored.

Sincerely,

/s/ Elizabeth Ginsburg  
ELIZABETH GINSBURG  
Attorney, Legal Department

cc: [see Appendix]

## EXHIBIT D

AMERICAN ARBITRATION ASSOCIATION  
1150 Connecticut Avenue, N.W., 6th Floor  
Washington, D.C. 20036-4104  
Telephone: (202) 296-8510

October 15, 1993

Re: 16 673 00277 93DS  
Air Line Pilots Association  
(Agency Fee Challenges—1992)  
(170 Challengers)

To all parties:

This will acknowledge receipt of a letter dated September 29, 1993, from the Union, requesting arbitration in accordance with the AAA Rules for the Impartial Determination of Union Fees. We assume copies of the letter have been forwarded to the Challengers. Enclosed for all parties is a copy of the Rules.

The Association, pursuant to Section 3 of the Rules, has to appoint Louis Aronin, Esq., as the Arbitrator in this matter.

We note the Union has requested that the proceedings in this arbitration be held in Washington, D.C.

Please note that Section 19 of the Rules provide for the waiver of oral hearings. Accordingly, and inasmuch as the parties are not all located in the same geographic area, Arbitrator Aronin has suggested that the parties may choose to present their case by written statements. If you choose to submit your case by written statements, instead of appearing in person, please advise this office on or before *October 25, 1993*.

If you have any questions, please call this office.

Sincerely yours,

/s/ Donna T. Sankar  
DONNA T. SANKAR  
Senior Case Administrator

\* \* \* \*

## EXHIBIT E

Rules for  
Impartial Determination  
of Union Fees

*as Amended  
and in Effect  
January 1, 1988*

American Arbitration Association  
140 West 51st Street, New York, NY 10020-1203  
Telephone: (212) 484-4000

## Introduction

In *Chicago Teachers Union v. Hudson*, the Supreme Court of the United States held that a labor union which charges nonmember employees an agency fee to defray the cost of providing service is required to give them "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision maker, and an escrow for the amounts reasonably in dispute while challenges are pending."

These Rules for Impartial Determination of Union Fees have been developed by the American Arbitration Association to provide "expeditious, fair, and objective" determinations of such challenges.

The American Arbitration Association (AAA) is a public-service, not-for-profit organization offering a broad range of dispute resolution services to business executives, attorneys, individuals, trade associations, unions, management, consumers, families, communities, and all levels of government. Services are available through AAA headquarters in New York City and through offices located in major cities throughout the United States. Hearings may be held at locations convenient for the parties and are not limited to cities with AAA offices. In addition, the AAA serves as a center for education and training, issues specialized publications, and conducts research on all forms of out-of-court dispute settlement.

When a union requests administration under these rules, the AAA will appoint an impartial arbitrator, who is experienced in employment relations.

These challenges could involve determinations about local, statewide, or national fees. The burden is upon the union to justify whatever fees are being disputed. Sometimes, such issues can be determined on the basis of documents. If a hearing is necessary, it should be held promptly so

that the arbitrator can comply with the time limits contained in the union's internal procedures and with applicable law. Arbitrators must accompany their awards with a written explanation of their determination.

The AAA is also prepared, at the request of the union, to hold a portion of the challenged union fees in escrow during the pendency of the challenge procedure.

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## Rules for Impartial Determination of Union Fees

### 1. Application of Rules

A union may obtain administration under these rules by requesting the AAA to appoint an arbitrator to determine the appropriate amount of a union fee in one or more of its bargaining units. These rules shall apply subject to and in accordance with the applicable statutory law and the internal procedures of the union involved.

### 2. Initiation of Arbitration

To initiate an arbitration under these rules, a union shall notify the AAA that challenges of its fees have been received from one or more individual employees, which are to be determined by an impartial arbitrator. The letter of notification shall identify the unions involved and the names and addresses of the individuals who have challenged the union fee or who, in accordance with applicable law or the organization's internal procedures, should be notified of the proceedings. The union and the challengers are hereinafter referred to collectively as the parties.

The letter of notification should describe the issues involved and notify the AAA of any relevant time limits contained in the applicable law or the union's internal procedures. The initiating letter may suggest an appropriate location for hearing.

### 3. Appointment of Arbitrator

Upon receiving such an initiating letter, the AAA will appoint an arbitrator from a special panel of arbitrators experienced in employment relations who is willing to hear and decide such issues in accordance with applicable law and the union's internal procedures, and who is prepared to meet the applicable time limits. The AAA will notify the parties of the arbitrator's appointment.

### 4. Disclosure of Grounds for Disqualification

Prior to accepting the appointment, a prospective arbitrator shall disclose any circumstance likely to create a presumption of bias. In its discretion, the AAA may disqualify an arbitrator based on such disclosure. After the parties in the procedure are notified of an appointment, they may challenge an arbitrator for cause by promptly notifying the AAA of their objection.

### 5. Vacancies

If for any reason an arbitrator should be unable to perform the duties of office, the AAA may, in its discretion, declare the office vacant and appoint a substitute.

### 6. Notification of Proceedings

Notice of the time and place of the arbitration hearing, as determined by the arbitrator, will be mailed to the parties by the AAA, at least 14 days in advance of the hearing.

### 7. Representation

Any party may be represented by counsel or by another authorized representative.

### 8. Stenographic Record

Any party wishing a stenographic record shall make such arrangements directly with the stenographer, notifying the AAA in advance of the hearing. If such a transcript is determined by the arbitrator to be the official record of the proceeding, it must be made available to the arbitrator and to the other parties for inspection, at a time and place determined by the arbitrator.

### 9. Attendance at Hearings

The arbitrator shall maintain the confidentiality of the hearings unless the law provides to the contrary. Persons having a direct interest in the arbitration are entitled to

attend hearings. The arbitrator shall have the power to require the retirement of any witness during the testimony of other witnesses. It shall be discretionary with the arbitrator to determine the propriety of the attendance of any other person.

#### 10. Adjournment

The arbitrator may for good cause shown adjourn a hearing upon the request of a party or upon the arbitrator's own initiative, but must observe all applicable time limits.

#### 11. Oaths

The arbitrator may require witnesses to testify under oath.

#### 12. Order of Proceedings

The arbitrator shall determine how the case can best be presented so that all parties have a fair opportunity to contest the issues. The names and addresses of all witnesses and exhibits in the order received shall be made a part of the record. The arbitrator shall afford full opportunity for presentation of relevant proofs.

#### 13. Arbitration in the Absence of a Party

The arbitration may proceed in the absence of any party who, after due notice, fails to be present or fails to obtain an adjournment. The arbitrator shall require the parties present to submit such evidence as may be necessary for the making of a determination.

#### 14. Evidence

The parties may offer such evidence as they desire and shall produce such additional evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. The arbitrator shall be the judge of the relevance and materiality of the evidence offered and conformity to legal rules of evidence shall not be necessary.

#### 15. Evidence by Affidavit and Filing of Documents

The arbitrator may receive and consider the evidence of witnesses by affidavit, giving it only such weight as seems proper after consideration of any objection made to its admission. Parties shall be afforded an opportunity to examine all documents submitted in the proceedings. Documents not filed with the arbitrator at the hearing, but which are with the arbitrator at the hearing, but which are arranged to be submitted late, shall be filed with the AAA for transmission to the arbitrator.

#### 16. Closing of Hearings

The arbitrator shall determine when sufficient evidence has been submitted for an understanding and determination of the dispute. At that point, the arbitrator may declare the hearings closed. If briefs or other documents are to be filed, the hearings may be declared closed as of a later date set by the arbitrator. The time limit within which the arbitrator is required to make an award shall be that contained in the applicable law and the union's internal procedures. If no specific date is fixed, the arbitrator shall have 30 days from the closing of hearings within which to make an award.

#### 17. Reopening of Hearings

The hearings may be reopened by the arbitrator at will or on the motion of any party, for good cause shown, at any time before the award is made, but, if the reopening of the hearings would prevent the making of the award within the time specified in the applicable law and the union's internal procedures, the matter may not be reopened.

#### 18. Waiver of Rules

Any party who proceeds after knowledge that any provision or requirement of these rules has not been complied

with, and who fails to state an objection thereto in writing, shall be deemed to have waived the right to object.

#### 19. Waiver of Oral Hearings

The parties may provide, by written agreement, for the waiver of oral hearings. If the parties are unable to agree as to the procedure, the arbitrator shall specify a fair and equitable procedure.

#### 20. Extensions of Time

The arbitrator for good cause may extend any period of time established by these rules, except the time for making the award. The AAA shall notify the parties of any such extension of time.

#### 21. Serving of Notice

Each party shall be deemed to have consented and shall consent that any papers, notices, or process necessary or proper for the initiation or continuation of an arbitration under these rules may be served by mail to the party's last known address or by personal service.

#### 22. Communication with Arbitrator

There shall be no communication between the parties and the arbitrator other than at oral hearings. Written communications from the parties to the arbitrator shall be directed to the AAA for transmittal to the arbitrator.

#### 23. Time of Award

The award shall be rendered promptly by the arbitrator and, unless otherwise specified by the applicable law and the union's internal procedures, not later than 30 days from the date of closing the hearings, or, if oral hearings have been waived, from the date of transmitting the final statements and proofs to the arbitrator.

#### 24. Form of Award

The award of the arbitrator shall be in writing and signed and shall be accompanied by a written explanation of the arbitrator's decision.

#### 25. Delivery of Award

The parties shall accept as legal delivery of the award the placing of the award or a true copy thereof in the mail by the AAA, addressed to each party's last known address or the filing of the award in any other manner that may be prescribed by applicable law and the union's internal procedures.

#### 26. Judicial Proceedings

Neither the AAA nor the arbitrator is an appropriate or necessary party in judicial proceedings relating to this procedure and neither the AAA nor any arbitrator shall be liable to any party for any act or omission in connection with any procedure conducted under these rules.

#### 27. Administrative Fee

As a not-for-profit organization, the AAA shall charge a fee payable by the union to compensate the AAA for the cost of providing necessary administrative services.

#### 28. Expenses

The expense of witnesses shall be paid by the party producing such witnesses.

#### 29. Arbitrator Compensation

The arbitrator will be compensated by the union, in accordance with the per-diem rate currently on file for that arbitrator with the AAA, and shall be reimbursed for expenses.

### 30. Interpretation and Application of Rules

The arbitrator shall interpret and apply these rules insofar as they relate to the arbitrator's powers and duties. All other rules shall be interpreted and applied by the AAA.

*To order additional copies of these rules or to ask questions about them, call the AAA office nearest you. A list of these offices appears on the back page of this pamphlet.*

\* \* \* \*

### EXHIBIT F

PHILIP F. HUDOCK  
Attorney at Law  
Suite 600  
8150 Leesburg Pike  
Vienna, Virginia 22182

---

(703) 883-8242

October 20, 1993

*Via Facsimile #202-872-9571*

Ms. Donna T. Sankar  
Senior Case Administrator  
American Arbitration Association  
1150 Connecticut Avenue N.W.  
Sixth Floor  
Washington, D.C. 20036-4104

Re: 16 673 00277 93DS  
Air Line Pilots Association  
1992 Agency Fee Challenges

Dear Ms. Sankar:

I am in receipt of a letter from ALPA to you dated September 29, 1993, requesting arbitration of challenges to 1992 Agency Shop fees. I also have copies of your letter of October 15, 1993 to pilots who objected to 1992 Agency Shop fees. That letter identifies the appointment of Louis Aronin as Arbitrator and contains Arbitrator Aronin's "suggestion" that the parties waive their rights to an oral hearing and "present their case by written statements."

I assume that ALPA has not disclosed to AAA that it is the Defendant in the United States District Court for the District of Columbia in agency shop litigation, which challenges every aspect of the 1992 Agency Shop fees. The case is captioned as *Miller, et al. v. ALPA, et al.*, Civil Action No. 91-3161. The case is assigned to Judge Norma H. Johnson. I am Plaintiffs' counsel in that litigation.

In the litigation, ALPA moved for summary judgment to have the case dismissed, and Agency Shop fees decided by arbitration. ALPA's brief states, as page 21:

"... if [the pilots] are dissatisfied with ALPA's determination [of 1992 agency shop fees], they must seek relief through the arbitration remedy provided in ALPA's 'Policies and Procedures Applicable to Agency Fees.' Only if they are dissatisfied with the result of such an arbitration may they bring a lawsuit."

Judge Johnson, by decision dated August 2, 1993, denied summary judgment, to the extent ALPA sought to have the case dismissed and the matter proceed by arbitration. Discovery is now ongoing in the litigation, with the expectation that the Judge will rule as to all matters relating to 1992 Agency Shop fees.

I assume it is not AAA's practice to be a party to arbitration as to matters that are then pending in court, where the Court has refused to stay the litigation (so that arbitration may proceed). Such arbitration would be direct interference with the Court's jurisdiction and conflict with the Court's ruling. Further, it would be particularly inappropriate for AAA to proceed with arbitration, where the pilots here specifically told ALPA that they were objecting to the 1992 Agency Shop fees, not because they wanted arbitration, but rather:

"... to preserve my rights and without waiver of benefits I may have from the pending litigation of *Miller, et al. v. ALPA, et al.*, Civil Action No. 91-3161, in the U.S. District Court for the District of Columbia."

In these circumstances, I believe the prudent course for AAA is to decline to participate in arbitration, and allow the present litigation to proceed.

Sincerely,

/s/ Philip F. Hudock  
PHILIP F. HUDOCK

PHF:dm

cc: Elizabeth Ginsburg, Esq.  
Legal Department, ALPA

## EXHIBIT G

AIR LINE PILOTS ASSOCIATION  
1625 Massachusetts Avenue, N.W.  
Washington, D.C. 20036  
(703) 689-2270

October 21, 1993

Ms. Donna T. Sankar  
Labor Supervisor  
American Arbitration Association  
1150 Connecticut Avenue, N.W.  
Sixth Floor  
Washington, D.C. 20036-4104

Dear Ms. Sankar:

The purpose of this letter is to respond to the letter sent to you by Philip F. Hudock, dated October 20, 1993. As Mr. Hudock states, he is the attorney for the plaintiffs in a lawsuit against ALPA raising various issues relating to agency fees. Four of Mr. Hudock's clients are also parties to the present arbitration proceeding. They are: Robert A. Miller, Donald Pedrazzini, Kenneth L. Shackelford, and Robert V. Ziminsky. Mr. Hudock did not expressly state that his letter was written on behalf of these four individuals, but we presume that it was. However, to our knowledge Mr. Hudock does not represent any of the other pilots who are parties to this arbitration proceeding.

We also understand from his letter that Mr. Hudock's clients do not wish to participate in the pending arbitration, and they are of course free to withdraw from it. However, there is no basis for halting the entire proceeding. First, except for Mr. Hudock's four clients, none of the other pilots in this case are parties to Mr. Hudock's lawsuit, and each of them has the right to arbitration under ALPA's Policies and Procedures Applicable to

Agency Fees. Second, contrary to Mr. Hudock's suggestion, Judge Johnson has not ruled on the issue of whether this or any other arbitration should proceed. Indeed, she did not even rule on ALPA's contention that the lawsuit should be dismissed pending arbitration. Rather, she denied that aspect of ALPA's motion for summary judgment "without prejudice to renewal following further proceedings, including the additional round of discovery." A copy of her decision is enclosed for your review. Finally, there is no basis for Mr. Hudock's "expectation that the Judge will rule as to all matters relating to 1992 Agency Shop fees."

ALPA will not compel any pilot to participate in this arbitration who does not wish to participate. On the contrary, ALPA's policies and procedures make arbitration available only to those pilots who affirmatively request it. Therefore, Mr. Hudock's clients, as well as all other parties to the arbitration, are free to withdraw from the proceeding if they wish to do so. However, unless *all* of the pilots withdraw, which seems quite unlikely, the arbitration should go forward.

Thank you for your assistance in this matter.

Sincerely,

/s/ Elizabeth Ginsburg  
ELIZABETH GINSBURG

EG:tam

Enclosures

cc: Philip F. Hudock, Esq.

bcc: Suzanne Kalfus

## EXHIBIT H

PHILIP F. HUDOCK  
 Attorney at Law  
 Suite 600  
 8150 Leesburg Pike  
 Vienna, Virginia 22182

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(703) 883-8242

November 11, 1993

*Via Facsimile #202-872-9571*

Ms. Donna T. Sankar  
 Senior Case Administrator  
 American Arbitration Association  
 1150 Connecticut Avenue N.W.  
 Sixth Floor  
 Washington, D.C. 20036-4104

Re: 16 673 00277 93DS  
 Air Line Pilots Association  
 1992 Agency Fee Challenges

Dear Ms. Sankar:

I wrote to you on October 20, 1993, concerning the ALPA request for arbitration as to agency shop fees. This letter spawned a reply from ALPA's counsel, Elizabeth Ginsburg, dated October 21, 1993. In that letter, Ms. Ginsburg stated that:

"Four of Mr. Hudock's clients are also parties to the present arbitration proceeding. They are: Robert A. Miller, Donald Pedrazzini, Kenneth L. Shackelford, and Robert V. Ziminsky. Mr. Hudock did not ex-

pressly state that his letter was written on behalf of these four individuals, but we presume that it was. However, to our knowledge Mr. Hudock does not represent any of the other pilots who are parties to this arbitration proceeding."

Ms. Ginsburg letter acknowledges that my four clients do not wish to participate in the arbitration, and that they are free to withdraw from arbitration. She adds:

"However, there is no basis for halting the entire proceeding. First, except for Mr. Hudock's four clients, none of the other pilots in this case are parties to Mr. Hudock's lawsuit, and each of them has the right to arbitration under ALPA's Policies and Procedures Applicable to Agency Fees."

Since my letter of October 20, 1993, and after other pilots became aware of my clients' position as to arbitration, I have received multiple requests from pilots to intervene as additional parties plaintiff in my clients' agency shop lawsuit.

It is my intent to file a motion with the United States District Court for the District of Columbia, for the intervention of these pilots. I prefer to present a single motion on behalf of all who seek to intervene (as opposed to a series of intervention requests). If all the pilots who have challenged the 1992 SGNE of ALPA seek intervention in the litigation, there will be no one left for ALPA to arbitrate with. I hope to know shortly exactly how many do wish to join the litigation.

Because parties to the arbitration are opting for litigation, I think it inappropriate for AAA to press forward with the arbitration until the Court has ruled on the intervention request. Thus, I repeat my prior request that the arbitration not proceed at this juncture.

Should AAA not be willing to voluntarily hold the arbitration in abeyance, I could seek an injunction from

the U.S. District Court to restrain the arbitration, since the issue of ALPA agency shop fees under the 1992 SGNE is before the Court. Since AAA's goal is to simplify dispute resolution, rather than make it more difficult, I assume AAA will concur in a hiatus of the arbitration activity at this time.

Sincerely,

/s/ Philip F. Hudock  
PHILIP F. HUDOCK

PFH:dm

cc: Elizabeth Ginsburg, Esq.  
Legal Department, ALPA

# EXHIBIT I

AIR LINE PILOTS ASSOCIATION  
1625 Massachusetts Avenue, N.W.  
Washington, D.C. 20036

November 11, 1993

Ms. Donna Sankar  
American Arbitration Association  
1150 Connecticut Avenue—Sixth Floor  
Washington, D.C. 20036-4104

Re: 16-673-00277-93DS

Dear Ms. Sankar:

I have received a copy of Mr. Hudock's latest letter to you, dated November 11. Once again, Mr. Hudock is asking AAA "to hold the arbitration in abeyance" because of a pending lawsuit against ALPA in which he represents the plaintiffs, four of whom are also parties to this arbitration. Mr. Hudock now states that he intends to file a motion to intervene in that lawsuit on behalf of a number of other pilots who are parties to this arbitration. He asserts that, "[i]f all the pilots who have challenged the 1992 SGNE of ALPA seek intervention in the litigation, there will be no one left for ALPA to arbitrate with." He also states that he "could seek an injunction . . . to restrain the arbitration."

As ALPA made clear in response to Mr. Hudock's previous letter, any pilot who does not wish to participate in this arbitration is free to withdraw from it. This is true for Mr. Hudock's clients as well as any other pilot who is currently a party to the arbitration. But the pendency of Mr. Hudock's lawsuit, by itself, is not a basis for suspending the arbitration, no matter how many pilots seek to intervene in it.

Mr. Hudock has the right to seek an injunction if he deems it appropriate, but we doubt that the court would grant such an injunction. In any event, unless and until a court of competent jurisdiction orders otherwise, this arbitration should go forward in accordance with the AAA rules.

Sincerely,

/s/ Elizabeth Ginsburg  
ELIZABETH GINSBURG

cc: Philip F. Hudock, Esq.

# EXHIBIT J

LOUIS ARONIN  
Arbitrator

Canton Cove, Suite 315  
2901 Boston Street  
Baltimore, MD 21224

(410) 732-1351

November 22, 1993

Ms. Donna T. Sankar, Senior Case Administrator  
American Arbitration Association  
1150 Connecticut Ave., NW  
Washington, D.C. 20036-4104

Re: 16 673 00277 93 DS  
Air Line Pilots Association  
Agency Fee Challengers—1992

Dear Ms. Sankar:

A number of the challengers who have objected to the agency fee charged by the Air Line Pilots Association have raised procedural questions requiring a response. Please send copies of this letter to counsel for the Air Line Pilots Association, Mr. Hudock, counsel for a number of challengers, and to the challengers listed in your correspondence.

Since the Air Line Pilots Association has agreed to have its policies and procedures relating to non-members' agency fees determined pursuant to the American Arbitration Association rules for "Impartial Determination of Union Fees," and in light of the fact that the procedure of the American Arbitration Association arose from the court decision in *Chicago Teachers Union v. Hudson* we are able to provide the following answers:

1. The burden of establishing that the expenditures were for purposes germane to the performance of representa-

tional functions and/or collective bargaining rests with the Air Line Pilots Association.

2. The number of challengers who wish to proceed with the arbitration is not relevant because pursuant to those rules so long as one non-member agency fee payer files a timely challenge we shall proceed to determine whether that fee did comply with all relevant laws and court decisions dealing with agency fees.

3. Whether the agency fee payer may seek redress through another forum, i.e. the courts, is not relevant for our purposes. Unless, and until, the undersigned has been enjoined from proceeding we intend to schedule a hearing, or hearings, as we deem necessary, to obtain the necessary information to determine the propriety of the agency fee payments required of non-members.

4. We do not believe our charter includes a role or right to determine whether a valid collective bargaining agreement existed to permit the agency fee or whether that arrangement required a vote of any group as a condition precedent to collection of agency fees.

5. The rules governing this arbitration proceeding are not those of the locale where the arbitration is heard. The rules are determined by Federal courts that have ruled on agency fees, administrative bodies, e.g. NLRB, NMB & Dept. of Labor, and the appropriate rules of the American Arbitration Association.

We hope that this will respond to most questions raised by challengers and counsel.

In the near future we shall determine the date and location of the hearing(s) deemed necessary to ascertain the facts and contentions involved in this matter.

Sincerely,

/s/ Louis Aronin  
LOUIS ARONIN

# AMERICAN ARBITRATION ASSOCIATION

1150 Connecticut Avenue, N.W., 6th Floor

Washington, D.C. 20036-4104

Telephone (202) 296-8510

November 24, 1993

Re: 16 673 00277 93DS

Air Line Pilots Association

(Agency Fee Challenges—1992)

(170 Challengers)

To all parties:

This will acknowledge receipt of the following:

1. Craig A. Sherman's letter dated 10/30/93, a copy of which we note was sent to the Union.
2. Willard F. Ice, Jr.'s letter dated 11/12/93, advising he is retracting from this arbitration.
3. D. F. Waldron's facsimile of 11/17/93.
4. Dennis E. Gruelich's letter dated 11/17/93.
5. Robert E. Scheinblum's letter dated 11/20/93.
6. John Fred Johnson's letter dated 11/19/93, withdrawing from this arbitration.
7. R. H. Geterman's letter dated 11/20/93, withdrawing from this arbitration.
8. Michael T. Hannan's letter dated 11/19/93, withdrawing from this arbitrator. We note a copy of the letter was sent to the Union.

At this time copies of the above letters are being sent to the Arbitrator and the Union.

This will also acknowledge receipt of a letter dated November 22, 1993, from Arbitrator Aronin, copies of which

are now enclosed for the Union, Mr. Hudock and all Challengers.

We again remind all parties that any correspondence sent to this office shall be copied to *the Union*.

Sincerely yours,

/s/ Donna T. Sankar  
DONNA T. SANKAR  
Senior Case Administrator

Enclosures: a/s

cc: Arbitrator Louis Aronin;  
Union:—Elizabeth Ginsburg, Esq.;  
Philip F. Hudock, Esq.;  
170 Challengers.

[Filed Jan. 21, 1994]

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

\_\_\_\_\_  
[Title Omitted]  
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**SUPPLEMENT TO MOTION TO INTERVENE**

Pursuant to F.R.Civ.P. 24, this Supplement is filed to the Motion to Intervene, which was served on January 7, 1994. The purpose of this Supplement is to add 12 additional "Applicants" who seek to intervene as party plaintiffs.

1. The original Motion to Intervene was filed on behalf of 142 pilots ("Applicants"), who sought to intervene as Plaintiffs in this agency shop, labor law litigation.

2. 12 additional individuals (the "Additional Applicants") wish to intervene, but were not included in the original Motion to Intervene.

3. The 12 Additional Applicants are nonunion pilots, employed by Delta. Their status in this litigation is identical to the other nonunion Delta pilots (who are either original Plaintiffs or Applicants listed in the original Motion to Intervene).

4. The Additional Applicants are identified in attached Pages 10A and 11 to the Second Amendment to the Complaint (as Applicant Nos. 143-154). Pages 10A and 11 replace Page 10.

5. The total number of Applicants is 154, of which 152 are pilots employed by Delta, and two are pilots employed by USAir.

WHEREFORE, the relief requested in the original Motion to Intervene is sought for the 12 Additional Applicants identified in this Supplement.

Dated: January 19, 1994

Respectfully submitted,

/s/ Philip F. Hudock  
 PHILIP F. HUDOCK, ESQ.  
 Bar No. 6130  
 Counsel for Plaintiffs  
 Suite 600  
 8150 Leesburg Pike  
 Vienna, Virginia 22182  
 (703) 883-8242

[Certificate of Service Omitted]

[Filed Jan. 24, 1994]

UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF COLUMBIA

\_\_\_\_\_  
 [Title Omitted]

\_\_\_\_\_  
**ORDER**

This case comes before the Court on plaintiffs' motion for a preliminary injunction. Plaintiffs are nonunion pilots employed by Delta Air Lines who brought this suit in 1991 to challenge, *inter alia*, the calculations upon which defendant Air Line Pilots Association ("ALPA") bases the fees it charges nonunion pilots.

In *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), the Supreme Court held that the First Amendment requires a union to give nonunion employees an adequate explanation of the basis for the collective bargaining fee that the union, as their exclusive bargaining agent, charges them. ALPA annually prepares a Statement of Germane and Nongermane Expenditures ("SGNE") that describes ALPA's activities and expenses during the year. The SGNE divides the expenditures into two categories, those that are germane to collective bargaining and those that are not. On June 15, 1993, ALPA completed the SGNE for 1993. In response to objections by plaintiffs and other nonunion pilots to the SGNE calculation, ALPA contacted the American Arbitration Association ("AAA") to arrange for arbitration of the dispute. Several objecting pilots requested both AAA and ALPA to delay arbitration until the Court could rule on a motion to intervene in this action, filed by 141 nonunion pilots on January 10, 1994. Neither AAA nor ALPA agreed to delay the arbitration, which is currently

scheduled to begin at 9.30 a.m. on January 24, 1994. Plaintiffs seek a preliminary injunction preventing the arbitration from going forward.

A preliminary injunction is an extraordinary equitable remedy that may be granted only upon a clear showing of entitlement. In order to obtain preliminary injunctive relief, a plaintiff must demonstrate:

- (1) that the plaintiff will suffer irreparable injury if injunctive relief is not granted,
- (2) a strong showing that the plaintiff is likely to prevail on the merits,
- (3) that an injunction would not substantially harm other interested parties, and
- (4) that an injunction would not significantly harm the public interest.

*Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958). On the first of these elements plaintiffs have clearly failed to carry their burden. As plaintiffs themselves explain in their memorandum, they face the following two alternatives:

- Ignore the January 24th arbitration, and risk the possibility of a *later* Court ruling that participating in the arbitration was a mandatory condition precedent to Ag[en]cy Shop litigation (thus waiving the right to Ag[en]cy Shop litigation); or
- Participate in the arbitration, and find in a *later* Court ruling that participation was *not* a mandatory condition precedent to Agency Shop litigation (i.e. the time and money spent on arbitration was wasted).

Pls.' Mem. in Support of Mot. for Prelim. Inj. at 2. The first of these alleged harms appears to be the most serious. Yet even if the Court assumes, for the sake of argument, that plaintiffs will indeed "waiv[e] the right" to pursue this

litigation if they "[i]gnore the January 24th arbitration," such harm would not be sufficient grounds for granting a preliminary injunction. If plaintiffs choose to ignore the arbitration and thereby waive their right to pursue this suit, then any harm that results will flow from their own chosen course of action. Plaintiffs could easily avoid this harm by participating in the arbitration. Such harm therefore cannot justify the issuance of a preliminary injunction. *See FIBA Leasing Co. v. Airdyne Indus.*, 826 F. Supp. 38, 39 (D. Mass. 1993) ("A preliminary injunction movant does not satisfy the irreparable harm criterion when the alleged harm is self-inflicted.").

If plaintiffs do participate in the arbitration, then according to their own reasoning the greatest harm they can suffer will be to "waste" time and money. This is not the sort of grievous harm that can justify the extraordinary equitable remedy plaintiffs seek. A party that moves for a preliminary injunction bears the burden of showing that the injury the party will suffer is "both certain and great." *Wisconsin Gas Co. v. Federal Energy Regulatory Comm'n*, 758 F.2d 669, 674 (D.C. Cir. 1985). Here, plaintiffs have not even described how much time or money they will "waste" if they participate in the arbitration. Even more importantly, however, plaintiffs must show that the injury will be impossible to correct or redress after it occurs: "[t]he possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." *Virginia Petroleum Jobbers*, 259 F.2d at 925. Plaintiffs have failed to show that a later award of money damages will be insufficient to compensate them for any time or money they might "waste" on January 24. Their claim of irreparable harm is therefore inadequate.

Plaintiffs have also failed to meet their burden with respect to the other factors set forth in *Virginia Petroleum Jobbers*. A strong showing that plaintiffs are likely to succeed on the merits of their claim is necessary to jus-

tify the exaraordinary equitable relief they seek, but plaintiffs have not made such a showing. Nor have plaintiffs demonstrated that an injunction would not harm other parties or the public interest. Indeed, defendants argue that postponement of the arbitration at this late date would seriously inconvenience many persons who plan to participate, and they also point out that plaintiffs learned of the arbitration in October and yet took no action before this week. Accordingly, it is this 24th day of January, 1994,

ORDERED that plaintiffs' motion for a preliminary injunction be, and hereby is, denied.

/s/ Norma Holloway Johnson  
NORMA HOLLOWAY JOHNSON  
United States District Judge

[Filed Dec. 8, 1994]

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

\_\_\_\_\_  
[Title Omitted]  
\_\_\_\_\_

**ORDER**

This matter is before the Court on defendant ALPA's suggestion of mootness, plaintiffs' motion to have 154 pilots intervene as plaintiffs, and the motion of plaintiff Donald Pedrazzini to withdraw. Upon consideration of the motions, responses, arguments of counsel at status hearing, and the entire record herein, the Court will deny the suggestion of mootness, grant the motion of Pedrazzini to withdraw, and grant in part and deny in part the motion to intervene.

Five months after the Court denied plaintiffs' class certification, plaintiffs filed the present motion for intervention on behalf of 154 pilots who plaintiffs claim would have been the class. Defendant ALPA does not contest the motion to intervene with respect to some of the pilots. ALPA does, however, object to the intervention of the following pilots: (1) those who are members of ALPA, (2) those who failed to object to the payment of agency fees not germane to collective bargaining, (3) those who are employees of USAir, and (4) those whose status with respect to the arbitration differs from that of the plaintiffs. Because ALPA only objects to the four groups of pilots stated above, and because the Court determines that the remaining pilots satisfy the requirements for intervention, the Court will allow those pilots to whom ALPA did not object to intervene without further discussion.

With respect to the four groups of pilots to whom ALPA has objected, the Court must apply Rule 24 of the Federal Rules of Civil Procedure. Intervention may be of right or permissive. Fed. R. Civ. P. 24(a), (b). The grounds for intervention of right are: (1) timeliness, (2) cognizable interest, (3) impairment, and (4) lack of adequate representation. Fed. R. Civ. P. 24(a); *see also Williams & Humbert Ltd. v. W. & H. Trade Marks (Jersey) Ltd.*, 840 F.2d 72, 74 (D.C. Cir. 1988). The grounds for permissive intervention are: (1) timeliness, (2) common questions of law or fact, and (3) no undue delay or prejudice to the original parties. Fed. R. Civ. P. 24(b).

The Court of Appeals for this Circuit has stated, "[a]n application to intervene should be viewed on the tendered pleadings—that is, whether those pleadings allege a legally sufficient claim or defense and not whether the applicant is likely to prevail on the merits." *Williams & Humbert*, 840 F.2d at 75. The Court finds that ALPA's objections to intervention with respect to the pilots who did not object and the pilots who may have a different arbitration status are objections to the pilots' likelihood of prevailing on the merits and thus are not valid objections to intervention. The Court finds that those pilots satisfy the requirements for intervention stated above. *See McCarthy v. Kleindienst*, 562 F.2d 1269 (D.C. Cir. 1977).

With respect to the pilots who are ALPA members and the pilots who are employed by USAir, namely Eugene C. Conway, E. Wilkes Stranch, and John M. Boland, the Court must deny their motion to intervene. The claims of those pilots are different from the claims of the other pilots. Conway, Stranch, and Boland have not shown that they have "an interest relating to the property or transaction which is the subject of the action" and that they are "so situated that the disposition of the action may as a practical matter impair or impede [their] ability to protect that interest." Fed. R. Civ. P. 24(a). Thus, they are not en-

titled to intervene of right. Furthermore, they do not meet the requirements for permissive intervention because the addition of new issues at this stage of the litigation would unfairly prejudice the original parties. The motion to intervene of Conway, Stranch, and Boland therefore must be denied.

With respect to the remaining issues, the Court will deny ALPA's suggestion of mootness and grant plaintiff Pedrazzini's unopposed motion to withdraw. The Court notes that all other pending motions were resolved at the status hearing on November 23, 1994.

Accordingly, it is this 8th day of December, 1994,

ORDERED that defendant ALPA's suggestion of mootness be, and hereby is, denied; and it is further

ORDERED that defendant ALPA's suggestion of mootness be, and hereby is, denied; and it is further

ORDERED that the claims of plaintiff Donald Pedrazzini be, and hereby are, dismissed with prejudice; and it is further

ORDERED that plaintiffs' motion to have 154 pilots intervene as plaintiffs be, and hereby is, granted in part and denied in part. Plaintiffs' motion to intervene is denied with respect to Eugene C. Conway, E. Wilkes Stranch, and John M. Boland, and granted with respect to the remaining 151 pilots.

/s/ Norma Holloway Johnson  
NORMA HOLLOWAY JOHNSON  
United States District Judge

[Filed Dec. 8, 1994]

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

\_\_\_\_\_  
[Title Omitted]  
\_\_\_\_\_

**SECOND AMENDMENT TO THE COMPLAINT**

Pursuant to Rules 15 and 24, the original and intervening Plaintiffs amend the Complaint, as stated in this Second Amendment, by adding to the original Complaint and the First Amendment to the Complaint the following:

87. USAir, Inc. ("USAir") is a corporation, which does business within the District of Columbia, and operates as a common carrier by air, engaged in interstate and foreign commerce. Pursuant to Section 201 of RLA (45 U.S.C. Section 181), USAir and its pilots are covered by the provisions of subchapter I (except Section 153) of RLA.

88. ALPA is the union which is the collective bargaining representative of pilots employed by USAir.

89. ALPA and USAir have in effect a collective bargaining agreement related to USAir pilots, which includes a "Union Security Agreement" permitted under Section 2 Eleventh (a) of RLA (45 U.S.C. Section 152 Eleventh (a)).

90. As is pertinent to this Action, the Union Security Agreement provisions of the Delta and USAir agreements are comparable.

91. The names, addresses, airline employer, and union/nonunion status of each of the intervening Plaintiffs are set forth below:

NAME/ADDRESS	CARRIER	UNION/ NONUNION
1. Ted M. Abbott 633 Ralls Rd. Hogansville, GA 30230	Delta	nonunion
2. Neal E. Alberts 2086 Truett Cir. Thousand Oaks, CA 91360	Delta	nonunion
3. Thomas A. Allen 7084 Pleasants Vly. Rd. Vacaville, CA 95688	Delta	nonunion
4. Clarence A. Anderson 2332 McCrea Rd. Thousand Oaks, CA 91362	Delta	nonunion
5. J. Eric Anderson 3086 Fawn Drive Park City, UT 84060	Delta	nonunion
6. Donald E. Asay 33 Ave. of Champions Nicholasville, KY 40356	Delta	nonunion
7. David J. Baccitich 14451 Heights Dr. Tustin, CA 92680	Delta	nonunion
8. Walter W. Baitis 4467 Karls Gate Dr. Marietta, GA 30068	Delta	nonunion
9. R.B. Barnes Lookout Farm RR-1, Box 126 Rumney, NH 03266	Delta	nonunion
10. David Bauer 15901 N.E. 133 St. Redmond, WA 98052	Delta	nonunion
11. Allan G. Blake 12SC11 200 Ave. S.E. Issaquah, WA 98027	Delta	nonunion

NAME/ADDRESS	CARRIER	UNION/ NONUNION
12. John M. Boland 1539 Flintridge Rd. Florence, KY 41042	Delta	union
13. Dale N. Boschetto 11408 N.E. 98 Cir. Vancouver, WA 98662	Delta	nonunion
14. Richard A. Breems 1700 S.E. 161 Pl. Vancouver, WA 98684	Delta	nonunion
15. John C. Brittenhaus 365 Mesa Ave. Newbury Park, CA 91320	Delta	nonunion
16. Robert Brushwyler 10143 Hillcrest Rd. Copertino, CA 95014	Delta	nonunion
17. G.D. Burson 33792 Kinkerry La. San Juan Capistrano, CA 92675	Delta	nonunion
18. Cornelius J. Carney 15706 N.E. 36 St. Vancouver, WA 98682	Delta	nonunion
19. Alvin W. Chamberlin 900—130 Ave. N.E. Bellevue, WA	Delta	nonunion
20. Maurice Cloutier 48 Aspengrove Dr. East Apt. H-1 Evanston, WY 82930	Delta	nonunion
21. Raymond Dale Compton P.O. Box 5842 Incline Village, NV 89450	Delta	nonunion
22. Eugene C. Conway 52 Trotter Cir. Sewickley, PA 15143	USAir	union

NAME/ADDRESS	CARRIER	UNION/ NONUNION
23. Peyton H. Cook, Jr. P.O. Box 1396 McDonough, GA 30253	Delta	nonunion
24. William S. Cook 629 12 St. Manhattan Beach, CA 90266	Delta	nonunion
25. Marcus Covington, Jr. Rt. 1, Box 281 Rayville, LA 71269	Delta	nonunion
26. James J. Crayton 1431 Crownhill Dr. Arlington, TX 76012	Delta	nonunion
27. Frederick T. Darvill 920 Ocean Bluff La. Coupeville, WA 98239	Delta	nonunion
28. Gale Charles Davis 22325 Blueberry La. Lake Forest, CA 92630	Delta	nonunion
29. Charles P. Dawsen 9110 Ridgeland Dr. Miami, FL 33157	Delta	nonunion
30. Brian Decker 10 Kiersted Ave. Kingston, NY 12401	Delta	nonunion
31. Timothy L. Dermer 6446-75 E. Trailridge Cir. Mesa, AZ 85205	Delta	nonunion
32. Joseph H. DeVelis 11 Ship Rock Rd. N. Hampton, NH 03862	Delta	nonunion
33. W. David Doiron 332 Aepli Tempe, AZ 85282	Delta	nonunion

NAME/ADDRESS	CARRIER	UNION/ NONUNION
34. James V. Dunlap 1967 Port Claridge Newport Beach, CA 92660	Delta	nonunion
35. John D. Durris P.O. Box 2624 Peachtree City, GA 30269	Delta	nonunion
36. James S. Ehmer 12514 Danbury Way Rosemount, MN 55068	Delta	nonunion
37. Joseph M. Elder 265 Brandon Mills Cir. Fayetteville, GA 30214	Delta	nonunion
38. Jerry D. Elmore 1623 59 Ave. Gig Harbor, WA 98335	Delta	nonunion
39. Bruce E. Elmquist 140 Terrace Rd. Sanger, TX 76266	Delta	nonunion
40. William T. Erwin 12719 Iss. Hobart Rd. Issaquan, WA 98027	Delta	nonunion
41. James T. Ferguson 921 Creek Crossing Coppell, TX 75019	Delta	nonunion
42. Roger Ferris 4855 W. Mission Blvd. Ontario, CA 91762	Delta	nonunion
43. Ferdinand Fletcher 2262 Soledad Rancho Rd. San Diego, CA 92109	Delta	nonunion
44. G.R. Fow 5201 S.R. 11 DeLeon Springs, FL 32130	Delta	nonunion

NAME/ADDRESS	CARRIER	UNION/ NONUNION
45. R. Dell Fuller P.O. Box 3359 Park City, UT 84060	Delta	nonunion
46. Alan L. Gaines 11320 Marjon Dr. Nevada City, CA 95959	Delta	nonunion
47. Gary Gebo 3214 38th Ave. N.W. Gib Harbor, WA	Delta	nonunion
48. James A. Gibbons 2535 Kinney Lane Reno, NV 89511	Delta	nonunion
49. Patrick M. Glazier 8500 Nottingwood Dr. Cincinnati, OH 45255	Delta	nonunion
50. Richard D. Grantham P.O. Box 6755 Laguna, CA 92607	Delta	nonunion
51. Dennis E. Creulich 463 Main St. P.O. Box 159 Oley, PA 19547	Delta	nonunion
52. Gary Guilliat Suite 166 930 Tahoe Blvd., Unit 802 Incline Vill., NV 89451	Delta	nonunion
53. John F. Gullledge 18 Oakmont Coto de Caza, CA 92679	Delta	nonunion
54. George S. Haines 200 Landing Rd. #90 Hampton, NH 03842	Delta	nonunion

NAME/ADDRESS	CARRIER	UNION/ NONUNION
55. Michael T. Hannan 1642 East 7080 So. Salt Lake City, UT 84121	Delta	nonunion
56. Barry W. Harman 7838 River Oaks Cir. Sandy, UT 84093	Delta	nonunion
57. George L. Harmon 2296 Valleyfield Ave. Thousand Oaks, CA 91360	Delta	nonunion
58. Douglas R. Harper 28 Hearthside Cir. Bedford, NH 03110	Delta	nonunion
59. John C. Harrison 2280 Glen Ellen Cir. Sacramento, CA	Delta	nonunion
60. James C. Harwood 19320 Orange Ave. Sonoma, CA 95476	Delta	nonunion
61. Harvey L. Hayden P.O. Box 117 Glen, NH 03838	Delta	nonunion
62. George Hector 2811 Desirae Chickasha, OK 73018	Delta	nonunion
63. John Hemminger 1630 900 St. Harlan, IA 51537	Delta	nonunion
64. L.R. Hern 3610 Patterstone Dr. Alpharetta, GA 30202	Delta	nonunion
65. Robert W. Hobbs 364 South Shore Rd. New Durham, NH 03855	Delta	nonunion

NAME/ADDRESS	CARRIER	UNION/ NONUNION
66. Harry F. Houdeshel 9091 Canyon Gate Rd. Sandy, UT 84093	Delta	nonunion
67. Willard F. Ice 4875 S. Mountain La. Salt Lake City, UT 84124	Delta	nonunion
68. Dominic M. Insogna 2056 McCrea Rd. Thousand Oaks, CA 91362	Delta	nonunion
69. John P. Jenkins 1091 Briar Lakes Rd. Watkinsville, GA 30677	Delta	nonunion
70. Peter G. Just 657 W. Ramsgate Rd. Farmington, UT 84025	Delta	nonunion
71. Robert Kane HC 65- Box 92 Cloudland, GA 30731	Delta	nonunion
72. Arthur L. Knowles Rt. 3, Box 132 Jacksboro, TX 76458	Delta	nonunion
73. Gordon B. Kuntz 7960 W. Lone Mountain Rd. Las Vegas, NV 89129	Delta	nonunion
74. Edouard W. Lacroix, Jr. 7 Dennett Rd. Marblehead, MA 01945	Delta	nonunion
75. Dominic Lemma 903 Keswick Cincinnati, OH 45230	Delta	nonunion
76. Leslie C. Long 139 Chaparral East Denton, TX 76208	Delta	nonunion

NAME/ADDRESS	CARRIER	UNION/ NONUNION
77. Robert G. Lyon, Jr. 19221 Lyon Ranch Rd. Sonoma, CA 95476	Delta	nonunion
78. Donald D. MacEachern 25 Congressional Drive Yarmouthport, MA 02675	Delta	nonunion
79. Peter E. Martin RR 11, Box 3 Laconia, NH 03246	Delta	nonunion
80. Donald E. Massey 505 Chippendale Dr. Rockwall, TX 75087	Delta	nonunion
81. Jack B. McBride 1625 Welcome Rd. Newnan, GA 30263	Delta	nonunion
82. Joe C. McDole 3080 Crestline Dr. Park City, UT 84060	Delta	nonunion
83. William A. McGaw 1554 N. Sweetwater Farmington, UT 84025	Delta	nonunion
84. Michael D. McGibney 1221 Green Valley Rd. Napa, CA 94558	Delta	nonunion
85. Gary R. McHargue 5745 Hidden Brook Ct. Westlake, Vill., CA 91362	Delta	nonunion
86. Dane W. McNeil 438 N. 950 E. Orem, UT 84057	Delta	nonunion
87. Charles R. Miller 1520 Highway 212 Conyers, GA 30208	Delta	nonunion

NAME/ADDRESS	CARRIER	UNION/ NONUNION
88. Dale E. Miller 33434 11 Pl. S.W. Federal Way, WA 98023	Delta	nonunion
89. Ronald A. Morin 1 Pinewood Rd. P.O. Box 1474 Manchester, MA 01944	Delta	nonunion
90. C. Richard Morrow 263 Westchester Dr. Griffin, GA 30223	Delta	nonunion
91. Robert M. O'Brien, Jr. P.O. Box 100 Brooks, GA 30205	Delta	nonunion
92. Winthrop B. Orgera 30661 Marbella Vista San Juan Capistrano, CA 92675	Delta	nonunion
93. Keith E. Parker 1716 Baron Ct. Daytona Beach, FL 32124	Delta	nonunion
94. Paul E. Paulsen 7 Sandia Heights Dr. N.E. Albuquerque, NM 87122	Delta	nonunion
95. Dale F. Peel P.O. Box 681887 Park City, UT 84068	Delta	nonunion
96. Joseph A. Peterman 190 Ford Rd. #377 Ukiah, CA 95482	Delta	nonunion
97. Larry W. Peterson 2810 Lindgren La. Maple Plain, MN 55359	Delta	nonunion
98. William W. Peterson 21 Snowstar La. Samay, UT 84092	Delta	nonunion

NAME/ADDRESS	CARRIER	UNION/ NONUNION
99. Patrick A. Pettyjohn 4809 Westhaven Arlington, TX 76017	Delta	nonunion
100. James R. Pittman 5737 Old Hwy 395N Carson City, NV 89704	Delta	nonunion
101. Thomas J. Prosch 7951 Mustang Loop Rd. Park City, UT 84060	Delta	nonunion
102. George S. Pupich 411 Lakewood Cir. Apt. C-301, Mox 169 Colorado Springs, CO 80910	Delta	nonunion
103. John C. Rector 1540 Rosita Dr. Las Vegas, NV 89123	Delta	nonunion
104. Terril J. Richardson P.O. Box 680201 Park City, UT 84068	Delta	nonunion
105. Charles E. Robinson P.O. Box 222 Ahwahnee, GA 93601	Delta	nonunion
106. Gordon G. Rogers 57 E. Hillside Ave. Salt Lake City, UT 84103	Delta	nonunion
107. Lenard A. Rogers 10290 N.W. 9 St. Cir. Apt. 508 Miami, FL 33172	Delta	nonunion
108. Allan H. Roy 12 Via Calandria San Clemente, CA 92672	Delta	nonunion
109. Melvin A. Rozema 426 No. 400 East Centerville, UT 84014	Delta	nonunion

NAME/ADDRESS	CARRIER	UNION/ NONUNION
110. James P. Scanlon 27251 Calle del Cid Mission Viejo, CA 92691	Delta	nonunion
111. Robert P. Scheinblum P.O. Box 680243 Park City, UT 84068	Delta	nonunion
112. N.E. Schulze 3680 Schooner Ridge Alpharetta, GA 30202	Delta	nonunion
113. John M. Sharp P.O. Box 1062 Boca Grande, FL 33921	Delta	nonunion
114. Kerin L. Shaughnessey RR 2, 606C Crockett Cir. New London, NH 03257	Delta	nonunion
115. Robert K. Shepherd 1900 Galaxy Dr. Newport Beach, CA 92660	Delta	nonunion
116. Gary D. Simmons Box 416-4 Chapman Ave. Oak Bluffs, MA 02557	Delta	nonunion
117. David F. Smith 274 Summer St. Salt Lake City, UT 84116	Delta	nonunion
118. Robert W. Spielman 250 Riverbend Dr. Reno, NV 89523	Delta	nonunion
119. Dale A. Sticka 1300 Chatsworth Ct. Callelyville, TX 76034	Delta	nonunion
120. Murray V. Stookey 19905 S.E. 424th Enuinclaw, WA 98022	Delta	nonunion

NAME/ADDRESS	CARRIER	UNION/ NONUNION
121. E. Wilkes Stranch 4009 Woodgrove La. Winston Salem, NC 27104	USAir	nonunion
122. Larry J. Taylor 1090 Hardeman Mill Rd. Madison, GA 30650	Delta	nonunion
123. John S. Thompson 90 Hickory Hill Dr. Oxford, GA 30267	Delta	nonunion
124. Donald L. Thorn 7379 Shepard Mesa Carpinteria, CA 93013	Delta	nonunion
125. Richard Tichacek 15767 Echo Hills Dr. Fountain Hills, AZ 85268	Delta	nonunion
126. James A. Tidwell 744 E. Shady Tree Ct. Salt Lake City, UT 84106	Delta	nonunion
127. Michael H. Uhlenhop 2500 El Tonas Way Carmichael, CA 95608	Delta	nonunion
128. Edwin D. Uselmann 35601 N.E. 251 St. Ave. Yacolt, WA 98675	Delta	nonunion
129. Ernesto E. Valadez P.O. Box 646 Frisco, CO 80443	Delta	nonunion
130. John M. Valenzuela 625 Pine St. Oakdale, CA 95361	Delta	nonunion
131. Denis F. Waldron 4688 Township Ct. Marietta, GA 30066	Delta	nonunion

NAME/ADDRESS	CARRIER	UNION/ NONUNION
132. Michael J. Walton 11208 N. St. Andrews Way Scottsdale, AZ 85254	Delta	nonunion
133. Robert W. Warner 5097 Olive Hill Rd. Fallbrook, CA 92028	Delta	nonunion
134. George B. Waterman Rt. 6, Box 560 Kemp, TX 75143	Delta	nonunion
135. Neal C. Watson Rt. 2, Box 146A Martin, GA 30557	Delta	nonunion
136. R. Taft Weaver 23480 Park Sorrento #209A Calabasas, CA 91302	Delta	nonunion
137. M.G. Wilson 3353 E. Tree Farm La. Salt Lake City, UT 84121	Delta	nonunion
138. Howard C. Wolf, Jr. 530 Heyward Cir. Marietta, GA 30064	Delta	nonunion
139. Michael N. Wood 15 Linden St. So. Hamilton, MA 01982	Delta	nonunion
140. H.S. Wright, III 905 Harvard Ave. E. Seattle, WA 98102	Delta	nonunion
141. Edward J. Wucik 4289 Country Garden Walk Kennesaw, GA 30144	Delta	nonunion
142. Warren B. Young 1021 Loma Vista Dr. Napa, CA 94558	Delta	nonunion

NAME/ADDRESS	CARRIER	UNION/ NONUNION
143. J.L. Armstrong 341 Longden Lane Solana Beach, CA 92075	Delta	nonunion
144. David L. Brinton P.O. Box 681185 Park City, UT 84068	Delta	nonunion
145. Jerald C. Burgess 192 Orange Park Redlands, CA 92374	Delta	nonunion
146. Robert D. Engel 1780 Wendy Way Reno, NV	Delta	nonunion
147. George W. Etter 1629 E. Palm Ave. #2 El Segundo, CA 90245	Delta	nonunion
148. Neil B. Fossum 630 N. Ironwood Way Gilbert, AZ 85234	Delta	nonunion
149. Don L. Fowler 4701 Canyon Trail No. #1605 Euless, TX 76040	Delta	nonunion
150. Nicholas Gravino 8800 S. Ocean Dr. #809 Jensen Beach, FL 34957	Delta	nonunion
151. Lester H. Ideker, Jr. 1525 Maplewood Court Woodstock, GA 30188	Delta	nonunion
152. John L. Lynch 253A Shoreview Ave. Cousins Is., ME 04096	Delta	nonunion
153. Einar J. Morgensen 1128 Edwards Road Greenville, SC 29615	Delta	nonunion
154. James Sorley 175N Summerview Court Layton, UT 84040	Delta	nonunion

92. The intervening Plaintiffs adopt as their claims the allegations in the original Complaint, the First Amendment to the Complaint, and this Second Amendment to the Complaint.

WHEREFORE, Plaintiffs respectfully pray that this Honorable Court grant relief as requested in the original Complaint, the First Amendment to the Complaint, and this Second Amendment to the Complaint.

Respectfully submitted,

/s/ Philip F. Hudock, Esq.  
PHILIP F. HUDOCK, ESQ.  
Bar No. 6130  
Counsel for Plaintiffs  
Suite 600  
8150 Leesburg Pike  
Vienna, VA 22182  
(703) 883-8242

[Filed Feb. 22, 1995]

## AMERICAN ARBITRATION ASSOCIATION

## HEARING

16 673 00277 93DS

IN THE MATTER OF:  
AIR LINE PILOTS ASSOCIATION  
(Agency Fee Challenges—1992)  
(170 Challengers)

Monday, January 24, 1994

The above-entitled matter came on for hearing, pursuant to notice, at 9:30 a.m.

Before: LOUIS ARONIN, ESQ.  
Neutral Arbitrator

\* \* \* \*

[7] MR. HUDOCK: My name is Philip Hudock, I'm an attorney admitted to practice in the District of Columbia, as well as other jurisdictions. My office is located at 8150 Leesburg Pike, Vienna, Virginia. I am counsel for plaintiffs in a lawsuit in the United States District Court for the District of Columbia, [8] Civil Action No. 91-3161, captioned as *Miller, et al. v. Air Line Pilots Association, et al.*, which is an agency shop litigation under the Railway Labor Act.

I will enter a conditional appearance today on behalf of the five plaintiffs in that lawsuit.

In addition, the conditional appearance on behalf of 154 pilots who have filed through me a motion to intervene in the federal litigation. The motion to intervene has not been ruled upon by Judge Johnson, the judge assigned to the case.

Each of the 159 people are pilots currently employed by an airline which is represented by the Air Line Pilots Association.

The conditional appearance is conditioned upon certain rulings that Judge Johnson will be making in the litigation. I filed an injunction in the *Miller* litigation last week, asking that the court stay this proceeding today pending certain rulings, such as whether the intervenors will be allowed to intervene in the *Miller* suit or not, and whether or not this arbitration is considered a mandatory condition precedent to these pilots proceeding to [9] challenge agency shop fees.

I will note that the litigation was begun on December 12th, 1991, but has not reached the merits as to what agency shop fees are yet.

Ms. Ginsburg and I had a conference call with Judy Brown, who is Judge Johnson's secretary, this morning, and we were advised that the judge has denied the request for preliminary injunction. Neither Ms. Ginsburg nor I have a copy of the order. That's being prepared. So to the extent—we don't know what the grounds are or the reasons. One of our concerns was whether or not the judge felt that an injunction might inconvenience other persons present, but obviously no one else is present but me on behalf of pilots.

To identify the specific pilots, I will tender to the Arbitrator and to ALPA the cover page of the original complaint, which names the five original plaintiffs, and a second amendment to the complaint which is pending in court, which identifies the 154 intervenors.

\* \* \* \*

[22] MR. HUDOCK: May I raise some issues?

There was a conference call between the Arbitrator and Ms. Ginsburg and myself on November 30, 1993, which touched on, amongst other things, the ground rules for the arbitration. In that conference call, I asked the Arbitrator if discovery were allowed, and I understand that your response was that [23] there is no discovery in this arbitration, and I would like to have that on the record.

MR. ARONIN: You have it on the record, sir.

MR. HUDOCK: And I also asked that there would be advanced identification of witnesses or advanced identification of exhibits, and you advised that there would be no such advanced identification.

MS. GINSBURG: Arbitrator Aronin, I'd like to object to Mr. Hudock using this arbitration as a basis for laying testimony for his litigation. Of course, this arbitration is likely to appear in the litigation, but to the extent that we can limit this arbitration to its focus, I think we will get through the proceeding more quickly, and Mr. Hudock will have the evidence that he needs for his litigation without taking us all down whatever roads he likes to travel in order to create his record for the litigation.

MR. ARONIN: So far we have two statements, and I agree with both of those statements, and for the record, one, there is no discovery. Two, I did not require any advanced identification by ALPA of the [24] witnesses or the exhibits it would present.

\* \* \* \*

(6)  
No. 97-428

Supreme Court, U. S.  
FILED

JAN 9 1998

CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1997

AIR LINE PILOTS ASSOCIATION,  
*Petitioner,*  
v.

ROBERT A. MILLER, *et al.*,  
*Respondents.*

On Writ of Certiorari to the  
United States Court of Appeals  
for the District of Columbia Circuit

BRIEF FOR PETITIONER

JERRY D. ANKER  
*(Counsel of Record)*  
CLAY WARNER  
Air Line Pilots Association  
Legal Department  
1625 Massachusetts Avenue, N.W.  
Washington, D.C. 20036  
(202) 797-4087

33 PP

### QUESTION PRESENTED

When nonunion employees wish to challenge the agency fee they are required to pay under an agency-shop agreement, must they exhaust the "impartial decisionmaker" procedure mandated by this Court's decision in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986), before bringing their claim to court?

# LIST OF PARTIES

The parties before the Court are the same as the parties in the court below. They are:

## *Petitioner (appellee below)*

Air Line Pilots Association

## *Respondents (appellants below)*

Ted M. Abbott	Maurice Cloutier
Neal E. Alberts	Ramond Dale Compton
Clarence A. Anderson	Payton H. Cook, Jr.
J. Eric Anderson	William S. Cook
J.L. Armstrong	Marcus Covington, Jr.
Donald E. Asay	James J. Crayton
David J. Baccitich	Frederick T. Darvill
Gerda H. Baitis as representative for the deceased Walter W. Baitis	Gale Charles Davis
	Charles P. Dawsen
	Brian Decker
R.B. Barnes	Timothy L. Dermer
David Bauer	Joseph H. DeVelis
Allan G. Blake	W. David Doiron
Dale N. Boschetto	James V. Dunlap
Richard A. Breems	John D. Durris
David L. Brinton	James S. Ehmer
John C. Brittenhaus	Joseph M. Elder
Robert Brushwyler	Jerry D. Elmore
Jerald C. Burgess	Bruce E. Elmquist
G.D. Burson	Robert D. Engel
Cornelius J. Carney	William T. Erwin
Alvin W. Chamberlain	George W. Etter

James T. Ferguson	Willard F. Ice
Roger Ferris	Lester H. Ideker, Jr.
Ferdinand Fletcher	Dominic M. Insogna
Neil B. Fossum	John P. Jenkins
G.R. Fow	Peter G. Just
Don L. Fowler	Robert Kane
R. Dell Fuller	Arthur L. Knowles
Alan L. Gaines	Gordon B. Kuntz
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John C. Harrison	Dane W. McNeil
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Harvey L. Hayden	Dale E. Miller
George Hector	Robert A. Miller
John Hemminger	Einar J. Mogensen
L.R. Hern	Ronald A. Morin
Robert W. Hobbs	C. Richard Morrow
Harry F. Houdeshel	Robert M. O'Brien, Jr.

Winthrop B. Orgera	Robert W. Spielman
Keith E. Parker	James Sorley
Paul E. Paulsen	Dale A. Sticka
Dale F. Peel	Murray V. Stookey
Joseph A. Peterman	Larry J. Taylor
Larry W. Peterson	John S. Thompson
William W. Peterson	Donald L. Thorn
Patrick A. Pettyjohn	Richard Tichacek
James R. Pittman	James A. Tidwell
Thomas J. Prosch	Michael H. Uhlenhop
George S. Pupich	Edwin D. Uselmann
John C. Rector	Ernesto E. Valadez
Terril J. Richardson	John M. Valenzuela
Charles E. Robinson	Denis F. Waldron
Gordon G. Rogers	Michael J. Walton
Lenard A. Rogers	Robert W. Warner
Allan H. Roy	George B. Waterman
Melvin A. Rozema	Neal C. Watshon
James P. Scanlon	R. Taft Weaver
Robert P. Scheinblum	M.G. Wilson
N.E. Schulze	Howard C. Wolf, Jr.
Kenneth Shackelford	Michael N. Wood
John M. Sharp	H.S. Wright, III
Kerin L. Shaughnessey	Edward J. Wucik
Robert K. Shepherd	Warren B. Young
Gary D. Simmons	Robert V. Ziminsky
David F. Smith	

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1997

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No. 97-428

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BRIEF FOR PETITIONER

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OPINIONS BELOW

The opinion of the court of appeals is officially reported at 108 F.3d 1415, and is reprinted in the separately bound appendix to the petition for certiorari (Pet. App.) at page 1a. The United States District Court for the District of Columbia issued three separate opinions plus an order denying a motion to amend or alter the judgment, none of which is officially reported. They are reproduced, respectively, at Pet. App. 21a, 44a, 62a and 41a. The Amended Opinion and Award<sup>1</sup> of Arbitrator Louis

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<sup>1</sup> The Amended Opinion and Award was identical to the arbitrator's original Opinion and Award except for nonsubstantive typographical and editorial corrections.

Aronin, whose findings of fact were accepted by the district court, is reprinted at Pet. App. 71a. The arbitrator also issued a Supplemental Opinion and Award, which is reprinted at Pet. App. 158a.

### JURISDICTION

The decision of the court of appeals was issued on March 14, 1997. A timely petition for rehearing and suggestion for rehearing *en banc* was denied by the court of appeals on June 9, 1997. (Pet. App. 162a, 164a). The petition for certiorari was filed on September 5, 1997, and granted (in part) on November 26, 1997. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

### CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 2 Eleventh of the Railway Labor Act, 45 U.S.C. § 152 Eleventh, provides in pertinent part:

Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the

later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

### STATEMENT OF THE CASE

Petitioner Air Line Pilots Association (ALPA) is a labor organization that represents the pilots employed by most U.S. commercial air carriers, including Delta Air Lines, Inc. In November 1991, ALPA and Delta negotiated several amendments to their existing collective bargaining agreement, including an "agency shop" provision. (J.A. 30-34). This provision requires all represented pilots who choose not to become or remain members of ALPA to pay a "service charge" to ALPA in an amount equal to ALPA's dues and certain assessments. ALPA has similar agreements with most other airlines with which it bargains.

Respondents, who are pilots employed by Delta, brought this action in December 1991 to enjoin implementation of the agency-shop agreement.<sup>2</sup> The jurisdiction of the dis-

<sup>2</sup> The original complaint was filed by five pilots, only three of whom remain in the case as respondents before this Court. One of the original plaintiffs, Donald Pedrazzini, voluntarily withdrew from the case while it was still pending in the district court. Another, Bruce R. Booher, was dismissed by the district court because he was an ALPA member, and he ultimately withdrew from the appeal. The other respondents are 150 fee-payer pilots (one of whom is now deceased and represented by his executor) who were permitted to intervene by the district court and who participated in the appeal.

trict court was invoked on the basis of 28 U.S.C. §§ 1331 and 1337, and 29 U.S.C. § 412. The original complaint alleged seven separate grounds on which respondents claimed the agreement was unlawful under federal statutory and constitutional law, and a subsequent amendment to the complaint added two more grounds (J.A. 10-29, 46-48). The district court, in three separate decisions (Pet. App. 21a, 44a, 62a), dismissed all of respondents' claims. Most of those claims were abandoned on appeal.

This Court's limited grant of certiorari concerns an issue that arose out of one of respondents' claims—*i.e.*, the claim that ALPA does not properly calculate the percentage of its expenses that are germane to collective bargaining and therefore chargeable to objecting agency-fee payers under applicable decisions of this Court. In response to this claim, ALPA contended, *inter alia*, that respondents were required to exhaust the "impartial decisionmaker" procedure mandated by this Court's decision in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986). The district court agreed, but the court of appeals did not. This exhaustion issue is the sole issue now before this Court.

#### **ALPA's Policies And Procedures Applicable to Agency Fees**

After this Court issued its decision in *Hudson*, ALPA adopted written "Policies and Procedures Applicable to Agency Fees" (J.A. 66-70) designed to comply with the requirements of that case. These Policies and Procedures:

(1) inform nonmember fee payers how to notify ALPA if they have an objection to paying for activities that are not germane to collective bargaining;

(2) require ALPA to prepare and distribute each year to all fee payers a "Statement of Germane and Nongermane Expenses" (SGNE), audited by ALPA's independent auditors, disclosing "in reasonable detail, the year's

expenditures, segregating those that were germane to collective bargaining from those that were not";

(3) provide that all fee payers who submit a written objection will receive an appropriate dues reduction, rebate, or credit, based on the percentage of ALPA's expenses that the SGNE shows were used for purposes not germane to collective bargaining; and

(4) provide an arbitration procedure by which an objector may challenge ALPA's calculation of the dues reduction or rebate. If the objector so requests, the amount reasonably in dispute will be placed in escrow. The selection of the arbitrator, and the procedures of the arbitration, are governed by the American Arbitration Association Rules for Determination of Union Fees.<sup>3</sup>

#### **The Arbitration Proceeding In This Case**

The first year that respondents were required to pay an agency fee pursuant to the Delta agency-shop agreement was 1992. (Pet. App. 1a-2a). The SGNE for that year was issued in 1993, after ALPA's 1992 books had been closed and audited. (Pet. App. 118a-157a). It showed that 19 percent of ALPA's expenses in 1992 were not germane to collective bargaining. (Pet. App. 120a).

One hundred seventy-four pilots requested arbitration of the 1992 calculation as reflected in the SGNE. Included were four of the original plaintiffs in this case, plus many (but not all) of the pilots who later intervened in this case. A number of these pilots later sought to withdraw from the arbitration, expressing a preference for pursuing their claims exclusively in court. (Pet. App. 72a). Shortly before the arbitration hearing, respondents requested the district court to enter a preliminary injunction to stop the arbitration until the court could determine whether exhaustion of the arbitration procedure was a pre-

<sup>3</sup> The American Arbitration Association Rules are reproduced at J.A. 84-94.

requisite to the lawsuit. (J.A. 54). The injunction was denied on the eve of the arbitration hearing. (J.A. 111). Respondents' counsel then appeared at the arbitration and stated that he was entering a "conditional appearance" on behalf of all of his clients (J.A. 134-35), even though some had never requested arbitration and others had withdrawn their requests.

The arbitrator ultimately ruled that only those fee payers who had submitted timely requests for arbitration prior to the hearing in accordance with ALPA's procedures were parties to the arbitration proceeding. (Pet. App. 73a-75a). Respondents did not contest this ruling.

The arbitration hearing occurred over three days, during which both oral testimony and documentary evidence were presented. Respondents' counsel participated actively in the proceeding. After the close of the hearing, both sides submitted comprehensive written briefs. (Pet. App. 71a-72a).

ALPA assumed the burden of proving to the arbitrator that it had an accurate and reliable record-keeping and accounting system, and that it had correctly allocated all of its expenses for the year on the basis of whether they were germane or not germane to collective bargaining.

To meet this burden, ALPA's witnesses first described ALPA's governance structure, its administrative management, and the size and role of its various staff departments. They also described the manner in which ALPA performs its collective bargaining and grievance handling responsibilities, and the ways in which its staff provides such support services as legal advice, economic and financial analysis, technical information, communications, and the like.

ALPA's witnesses also described ALPA's accounting system, and how ALPA uses that system to prepare its annual Statement of Germane and Nongermane Expenses.

Briefly summarized, this evidence showed that ALPA's accounting system simultaneously tracks costs in two separate ways. First, it maintains a traditional ledger system that charges every expense to a "natural" account—*i.e.*, an account reflecting the "nature" of the expense such as salary, rent, or professional services. Second, it also includes a functional accounting system that simultaneously charges each expense to a specific "project" account based on the purpose for which the money is spent. Each project has a numerical code, and there is a system for establishing a new project code whenever a new project is begun. In 1992, there were approximately 1200 active projects to which expenses were charged.

ALPA's computers will not issue a check for any expense unless the appropriate accounting information, including project number, is entered. To provide this information, all internal vouchers, requisition forms, expense statements, and the like require a project number. Similarly, in order to properly charge employee salary and benefit expenses, all employees submit weekly time reports identifying each project on which they worked each day of the week, and the number of hours devoted to that project. Employee salaries and benefits are allocated to the projects based on these weekly time reports. A similar system of time reporting and cost allocation is used for pilot members whose airline pay is reimbursed by ALPA when they perform union work.

ALPA's Finance Director explained how the project accounts are used to prepare the SGNE. It is his responsibility, with the assistance of counsel, to examine each project and make a determination of whether it is germane to collective bargaining. Each project is then assigned to one of the four germane or seven nongermane expense categories in the SGNE.<sup>4</sup> A list showing all of the proj-

<sup>4</sup> An explanation of each of these categories is included in the SGNE. (Pet. App. 126a-130a).

ects, by category, is attached to the SGNE. (Pet. App. 131a-157a).

The arbitrator issued a 40-page written decision, in which he "address[ed] each of the issues raised in this proceeding at the hearing, by briefs, or by comments from Challengers, topic by topic." (Pet. App. 73a). With respect to each issue, the arbitrator reviewed both the record of the proceeding and the relevant judicial decisions. One of respondents' principal contentions, both in the arbitration and in court, was that the evidence ALPA had presented based on its accounting records was insufficient to satisfy its burden of proof, that ALPA had to provide direct evidence of the nature and purpose of each individual expense incurred during the year—voucher by voucher, time sheet by time sheet, check by check.<sup>5</sup> The arbitrator rejected this contention and held that ALPA had satisfied its burden:

Counsel for the Challengers argues that, absent a detailed explanation of every claimed expenditure, it may not be allowed as a germane expense. We disagree. The Union has provided ample detail to justify its expenditures, both by project listing and by explanation of the nature of the expenditures.

(Pet. App. 90a).

The arbitrator also decided numerous disputed issues concerning specific projects and categories of expenses. He upheld ALPA's chargeability determinations in most respects, but directed ALPA to reallocate expenses in four areas from germane to nongermane, and ALPA did so. The reallocations resulted in an increase in the nongermane percentage for 1992 from 19 to 20.49 percent. The

<sup>5</sup> In the district court respondents sought discovery of all documentation relating to all individual expenses incurred during the year 1992, such as cancelled checks, invoices, vouchers, time sheets, purchase orders, travel authorizations, and expense reports. These records filled approximately 100 file boxes.

arbitrator approved this recalculation in his Supplemental Opinion and Award. (Pet. App. 158a-161a).

### **The Decisions Of The District Court**

As noted above, the district court issued three separate decisions concerning the merits of this case. The first two of these decisions dealt with issues that, given this Court's limited grant of certiorari, are not relevant here. In the third decision, issued on August 30, 1995, the court held that nonunion employees who wish to challenge the calculation of their agency fees must exhaust the "impartial decisionmaker" procedure mandated by *Hudson*.<sup>6</sup> Therefore, those of the plaintiffs who were not parties to the arbitration could not pursue their claims in court. (Pet. App. 27a-32a). In justifying this conclusion, the court stated:

The Court concludes that the requirement of exhaustion of arbitral remedies and the standard of review set forth above give effect to the procedures established by the Supreme Court in *Hudson* and prevent the situation whereby unions subject to the RLA would have to defend their agency shop fee calculations in two separate trials every year—both in an arbitration proceeding and in a lawsuit brought by nonmembers who elect not to participate in the arbitration.

(Pet. App. 31a-32a).

### **The Court Of Appeals Decision**

The court of appeals reversed the district court on several grounds, including the issue of exhaustion. It held that respondents were not required to exhaust the arbitra-

<sup>6</sup> The court also held that the proper standard of review of the arbitration decision would be to "defer to the findings of fact of the arbitrator unless those findings are clearly erroneous," but to "review *de novo* the arbitrator's legal conclusions." (Pet. App. 22a). This issue was excluded from this Court's grant of certiorari.

tion procedure, because they had never agreed to arbitration.

The court recognized that “[t]he circuits are split as to whether a union, obliged by federal law to offer *Hudson*-style arbitration to nonmembers challenging the amount of agency fees that they are charged, is entitled to insist on ‘exhaustion’ before the dissident employees come to federal court.” (Pet. App. 10a). The court also acknowledged that Justice White’s concurring opinion in *Hudson* had expressed the view that exhaustion was required. The court concluded, however, that there was “no legal basis for forcing into arbitration a party who never agreed to put his dispute over federal law to such a process. Nor is there anything in the *Hudson* majority opinion that even suggests that the Court thought it was putting protesting agency shop employees in that position.” (Pet. App. 11a, emphasis in original; footnote omitted).

#### SUMMARY OF ARGUMENT

In a long line of cases this Court has held that a union may not use funds paid under a union-security agreement by objecting fee payers for purposes that are not related to the union’s collective bargaining role. In applying this rule in any given case, countless issues will arise concerning precisely which of the union’s myriad activities during the relevant period are chargeable and which are not, and whether the union has adequately tracked and accounted for the thousands of individual expenditures it incurred.

In *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986), the Court established procedures for dealing with such issues. The union must provide “an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending.” 475 U.S. at 310. The issue of whether agency-fee objectors must exhaust this procedure before challeng-

ing the union’s fee calculations in court was not presented, although Justice White, in a concurring opinion joined by Chief Justice Burger, stated that exhaustion would be required. *Id.* at 311. That is the issue now before the Court.

Where, as here, the issue of exhaustion is not controlled by statute, it is decided on the basis of “sound judicial discretion.” *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992). The exercise of such discretion is particularly appropriate in this area of the law, where all the governing rules have been established judicially rather than legislatively.

Several strong reasons support a requirement of exhaustion of the *Hudson* procedures. First, a basic purpose of those procedures—to relieve the courts of having to “micromanage” agency-fee calculations—would not be achieved if objectors could proceed directly to court. Second, in the absence of an exhaustion rule, some objectors would likely opt for arbitration while others chose to sue immediately in one or more courts, thereby generating litigation of the same issues simultaneously in two or more forums. Third, if an arbitration does take place, it could produce an outcome satisfactory to all parties, thereby avoiding court litigation entirely. Fourth, if court litigation does take place, the arbitration record and decision will help define and narrow the issues, disclose strengths and weaknesses in the parties’ respective positions, and thus streamline both pretrial and trial procedures.

There are no significant countervailing considerations militating against an exhaustion requirement. The *Hudson* requirement that the arbitration be “prompt” ensures that the time required for exhaustion will not be excessive, and in any event the escrow required by *Hudson* protects the objectors from injury resulting from delay. The remedy available through arbitration is fully adequate, and the procedure is fair and impartial.

## ARGUMENT

### EXHAUSTION OF THE IMPARTIAL-DECISION-MAKER PROCEDURE MANDATED BY HUDSON SHOULD BE REQUIRED BEFORE AN AGENCY-FEE PAYER MAY CHALLENGE A FEE CALCULATION IN COURT.

#### A. The Substantive Legal Background.

The question presented in this case is procedural in nature, but no procedural question can be properly considered without reference to the substantive legal principles that the procedures at issue would implement. We begin, therefore, with a brief review of the substantive legal background against which the procedural issue arises.

In a series of cases beginning with *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961), this Court imposed limits on the purposes for which unions may use funds received from objecting fee payers pursuant to agency-shop agreements or similar forms of union-security arrangements. The early cases held that an objector's payments could not be used for political or ideological purposes to which he or she is opposed. *Street, supra*; *Brotherhood of Ry. Clerks v. Allen*, 373 U.S. 113 (1963); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). Later cases expanded the prohibition to the use of objectors' funds for those activities, even if not political or ideological, that are determined to be unrelated to the union's role as collective bargaining representative. See *Ellis v. Brotherhood of Ry. Clerks*, 466 U.S. 435 (1984); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991). To the extent that the union incurs expenses outside of these limitations, it must give objecting fee payers a pro rata fee reduction.

This body of law has been developed by the Court as a matter of both statutory interpretation and constitutional

law. In the private sector, the Court has determined that the statutory provisions that authorize union-security agreements may not be construed to permit such agreements to be used to compel objecting fee payers to support union activities that are unrelated to collective bargaining. See *International Ass'n of Machinists v. Street, supra* (Railway Labor Act); *Communications Workers v. Beck*, 487 U.S. 735 (1988) (National Labor Relations Act). In the public sector, the Court has held that the use of governmental power to compel workers to support a union against their will is permissible only to the extent that such compulsion bears a reasonable relationship to the collective bargaining process; otherwise, such compulsion would be an excessive intrusion on freedom of speech and association under the First Amendment. See *Abood v. Detroit Bd. of Educ.*, *supra*.

This Court has twice articulated general standards for determining which union expenses are chargeable to objecting agency-fee payers and which are not. In *Ellis v. Brotherhood of Ry. Clerks*, 466 U.S. at 448, the test was said to be:

... whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.

In *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. at 519, a public-sector case, the Court stated:

... chargeable activities must (1) be "germane" to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding "free riders"; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.

These broad standards have proven to be distressingly difficult to apply. Modern unions are large, complex,

multifaceted organizations. In any given year, their members, officers, and employees engage in a wide range of union-sponsored activities; their facilities are used for a multiplicity of purposes; and, in the case of larger unions, their treasuries expend tens of millions of dollars per annum, issuing hundreds of thousands of individual checks to thousands of different recipients. No matter how meticulous and conscientious a union may be in keeping its financial records and categorizing its expenses based on the *Ellis* and *Lehnert* standards, an objector—who may be hostile to the union for other reasons and resentful of having to share *any* union costs—can always find issues to raise concerning the union's record-keeping or its allocation or characterization of specific expenses.

It should not be surprising, therefore, that this has been a fertile field for litigation, particularly since a well-financed organization, the National Right to Work Legal Defense Foundation (which represents the respondents here), devotes a large part of its resources to the support of litigation challenging the administration of union-security agreements.

#### **B. The Procedural Requirements Of *Hudson*.**

*Hudson* established three procedural requirements that unions must meet in implementing the substantive principles outlined above. The Court held that "the constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis for the fee, a *reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker*, and an escrow for the amounts reasonably in dispute while such challenges are pending." 475 U.S. at 310 (emphasis added). With respect to the requirement of an impartial decisionmaker, the Court explained:

Although we have not so specified in the past, we now conclude that such a requirement is necessary. The nonunion employee, whose First Amendment

rights are affected by the agency shop itself and who bears the burden of objecting, is entitled to have his objections addressed in an expeditious, fair, and objective manner.

475 U.S. at 307 (footnote omitted).

The *Hudson* opinion indicates that one of the Court's purposes was to provide an alternative, nonjudicial mechanism for dealing with the many complexities that arise in agency-fee disputes. The Court noted that it had twice previously suggested that unions establish such alternative procedures voluntarily. *Id.* at 307 n.19, citing *Brotherhood of Ry. Clerks v. Allen*, 373 U.S. at 122 and *Abood v. Detroit Bd. of Educ.*, 431 U.S. at 240 & n.41. In *Allen* the Court had referred to the "practical difficulties" of administering a judicial remedy, and commented:

It is a lesson of our national history of industrial relations that resort to litigation to settle the rights of labor organizations and employees very often proves unsatisfactory. The courts will not shrink from affording what remedies they may, with due regard for the legitimate interests of all parties; but it is appropriate to remind the parties of the availability of more practical alternatives to litigation for the vindication of the rights and accommodation of interests here involved.

373 U.S. at 122, 123-24. In *Hudson* the Court decided to make such "practical alternatives to litigation" mandatory rather than voluntary.

Although *Hudson* was a public-sector case arising under the First Amendment, the present parties and the courts below have all presumed that the same requirements would apply to unions covered by the Railway Labor Act. As the court of appeals put it, "[w]e see no reason why [the] statutory duty of fair representation owed to non-member agency shop employees carries any fewer proce-

dural obligations than does a constitutional duty." (Pet. App. 10a).<sup>7</sup>

The majority opinion in *Hudson* did not discuss the question of whether a fee payer must exhaust the impartial-decisionmaker procedure before challenging an agency-fee calculation in court. That issue was not raised on the facts presented. Nevertheless, Justice White, joined by Chief Justice Burger, addressed the issue in a concurring opinion:

[I]f the union provides for arbitration and complies with the other requirements specified in our opinion, it should be entitled to insist that the arbitration procedure be exhausted before resorting to the courts.

475 U.S. at 311.

The exhaustion issue did arise later in *Hudson*, after the case was remanded to the district court. When the union in that case took steps to comply with this Court's decision, the plaintiff teachers raised various new issues, one of which was that a new disclosure notice issued by the union was inadequate, because the union had incor-

<sup>7</sup> The courts below also relied on *Railway Employees' Dep't v. Hanson*, 351 U.S. 225 (1956), which held that union-security arrangements under the Railway Labor Act are subject to review under the First Amendment. The rationale of this holding was that the Railway Labor Act, by displacing state laws that prohibit union-security agreements, makes such agreements the equivalent of an action of the federal government. While *Hanson* has never been overruled, and therefore was considered binding precedent in the courts below, this Court should no longer follow it. Its reasoning is inconsistent with later decisions of this Court, which hold that private conduct does not become state action for constitutional purposes merely because it is permitted or authorized by state law or regulation. Rather, the government must have exercised "coercive power" to cause the action in question, or "provided such significant encouragement . . . that the choice must in law be deemed to be that of the State." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (and cases there cited). The Railway Labor Act in no way coerces or encourages parties to enter into agency-shop agreements; it merely permits them.

rectly calculated its chargeable and nonchargeable expenses. Specifically, the plaintiffs contended that the union had

based its fee calculation on an incorrect definition of collective bargaining services, identified categorical expenses too broadly, relied on an economically "invalid" method for allocating costs between chargeable and non-chargeable categories, allocated as chargeable costs activities which do not benefit teachers, employed "incomplete, insufficient, and misleading" accounting verifications, and used incorrect formulas in calculating allocable costs for collective bargaining.

*Hudson v. Chicago Teachers Union, Local No. 1*, 922 F.2d 1306, 1313-14 (7th Cir.), cert. denied, 501 U.S. 1230 (1991). This new contention squarely raised the issue of whether the court should review the union's fee calculation on the merits or require that issue to be submitted to an impartial decisionmaker. The Seventh Circuit ruled that the matter must first proceed to arbitration:

Requiring the federal courts to micromanage the fee calculation in every case challenging a union's fair share fee would place an overwhelming and unrealistic burden on the courts. . . . Contrary to the plaintiffs' position, *Hudson* did not contemplate that federal courts would be required, on the basis of the notice, to pass on the legality and accuracy of every element of the fee calculation before any fees could be collected. Were we to accept plaintiffs' invitation and provide a hearing and judicial determination of the correctness of the fee, we would in effect render redundant and irrelevant the requirements that an impartial decisionmaker hear the dispute and that an escrow account be provided for the amounts reasonably in dispute while the challenge is pending. The proper procedure employs each of the three prerequisites identified by the Supreme Court: the fair share notice provides the basis for a challenge to the fair

share fee assessment; the impartial decisionmaker determines the correctness of the fee amount; and the escrow protects the challenger's funds pending such a decision. . . . Of course, the impartial decisionmaker's determination is not the final word on the challenge. If the decision is adverse to the plaintiffs, they may *subsequently* seek review by a federal court.

922 F.2d at 1314 (emphasis in original). *Accord: Crosetto v. Heffernan*, 810 F. Supp. 966, 982 (N.D. Ill. 1992), *aff'd in part, vacated in part on other grounds sub nom. Crosetto v. State Bar of Wisconsin*, 12 F.3d 1396 (7th Cir. 1993), *cert. denied*, 511 U.S. 1129 (1994). In a subsequent case the Tenth Circuit reached the same conclusion, pointing out that, unless exhaustion was required, the impartial-decisionmaker requirement would be "largely a waste of time and money,"<sup>8</sup> and "we would more often be forced to micromanage the fee calculation in every case challenging a union assessment." *Lancaster v. Air Line Pilots Ass'n*, 76 F.3d 1509, 1522 (10th Cir. 1996).<sup>9</sup>

<sup>8</sup> Quoting *Bromley v. Michigan Educ. Ass'n-NEA*, 843 F. Supp. 1147, 1153 (E.D. Mich. 1994), *rev'd*, 82 F.3d 686 (6th Cir. 1996), *cert. denied*, — U.S. —, 117 S. Ct. 682 (1997).

<sup>9</sup> As the decision below noted, there are also cases to the contrary. *E.g.*, *Bromley v. Michigan Educ. Ass'n-NEA*, 82 F.3d 686, 694-95 (6th Cir. 1996), *cert. denied*, — U.S. —, 117 S. Ct. 682 (1997); *Knight v. Kenai Peninsula Borough School Dist.*, 1997 WL 751724 at pp. \*9-10 (9th Cir. Dec. 8, 1997). See also *Hohe v. Casey*, 956 F.2d 399, 406-09 (3d Cir. 1992) (exhaustion is not required with respect to the constitutional issue of whether a particular activity is chargeable, but may be required as to accounting disputes concerning the amount spent for any activity).

These were all public-sector cases brought under 42 U.S.C. § 1983, and they relied heavily on the principle that exhaustion of state remedies is not required before an action can be brought under that statute. See *Patsy v. Board of Regents of Florida*, 457 U.S. 496 (1982). The impartial-decisionmaker procedure required by *Hudson*, however, is not a state remedy; rather, it is a federal remedy which a public-sector union has a constitutional duty to provide. It would therefore not be at all inconsistent with *Patsy*

### C. The Reasons Why Exhaustion Should Be Required.

Where not explicitly governed by statute, the issue of whether administrative remedies must be exhausted is a matter committed to "sound judicial discretion." *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992). Exhaustion may be required by "judicial decision rather than specific congressional demand." *McGee v. United States*, 402 U.S. 479, 483 n.6 (1971). The exhaustion issue presented in this case is particularly appropriate for resolution on the basis of judicial discretion, since all the procedural requirements of *Hudson* were established judicially, not legislatively. Indeed, the issue here arises in the context of an entire body of law the details of which are not found in any statute or regulation, but instead have been developed by this Court to achieve the goals of the relevant labor statutes and the First Amendment.

Therefore, the mere fact that the *Hudson* impartial-decisionmaker procedure is not a voluntary arbitration procedure agreed upon between the parties is not dispositive of the exhaustion issue, as the court of appeals thought. ALPA, after all, is required to provide that procedure whether it wishes to do so or not. The question of whether the objectors should be required to exhaust that procedure, therefore, also should not be decided solely on the basis of their preference in the matter. Rather, it must be decided in the exercise of judicial discretion, informed by all relevant prudential considerations, including those that caused the Court to mandate the procedure in the first place.

The court of appeals also expressed the view that exhaustion can only be required when it is "applied to en-

to require exhaustion of the *Hudson* procedure in public-sector cases brought under § 1983. See also Martin H. Malin, *The Legal Status of Union Security Fee Arbitration After Chicago Teachers Union v. Hudson*, 29 B.C. L. Rev. 857, 881 (1988) (arguing that an objector suffers no constitutional injury that would be actionable under § 1983 until "after the arbitrator's award frees the union to spend objectors' fees on arguably objectionable matters").

sure that senior officials in a government agency have authoritatively ruled, in accordance with available procedures, on an issue that a party attempts to bring to court based on a preliminary decision of a subordinate official." (Pet. App. 5a). The cases make clear, however, that courts have much broader discretion to require exhaustion for any reason deemed sound by the court.

In *McCarthy v. Madigan*, *supra*, for example, the Court identified two separate and independent reasons that can support a requirement of exhaustion—one being "protecting administrative agency authority" and the other being "promoting judicial efficiency." 503 U.S. at 145. The Court went on to cite, as possible "judicial efficiency" reasons, (a) the possibility that "a judicial controversy might well be mooted, or at least piecemeal appeals may be avoided" by requiring exhaustion, and (b) the likelihood that "exhaustion of the administrative procedure may produce a useful record for subsequent judicial consideration, especially in a complex or technical factual context." *Id.* It is thus apparent that the court of appeals here defined the exhaustion doctrine much too narrowly.

Not surprisingly, the exhaustion doctrine is not limited only to administrative procedures of governmental agencies. For example, in *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965), the Court held that an employee seeking severance pay pursuant to a collective bargaining agreement could not sue his employer without first exhausting the grievance and arbitration procedure provided by the agreement. Exhaustion was deemed appropriate in that case not for any reason relating to the "authority" of any "senior official," but because (1) "Congress has expressly approved contract grievance procedures as a preferred method for settling disputes," (2) the union has a legitimate interest in "participat[ing] actively in the continuing administration of the contract," (3) the employer has a legitimate interest in "limiting the

choice of remedies available to aggrieved employees," and (4) exclusive grievance procedures are important to maintaining stability of collective bargaining relationships. 379 U.S. at 653.

There are similarly strong reasons why this Court should require exhaustion of the *Hudson* procedures.

First, as noted above, one of the apparent purposes of *Hudson* is to establish an alternative dispute resolution procedure to relieve the courts of having to "micromanage" agency-fee calculations. That goal will not be achieved if employees are free to circumvent the procedure and go directly to court.

Second, in the absence of an exhaustion requirement, a union could be confronted by *simultaneous* agency-fee challenges, in court and before a *Hudson* impartial decisionmaker. That is precisely what happened here. A number of fee payers who were not litigants in this case requested arbitration under ALPA's procedures, thereby requiring ALPA to go to arbitration regardless of the wishes of the pilots who had brought this lawsuit. The respondents, meanwhile, wanted to avoid the arbitration and press their lawsuit. In the absence of an exhaustion requirement, both groups of pilots would have been entitled to proceed, and the same issues would have been litigated simultaneously in two forums, with ALPA defending the same allocations and determinations in both places. Furthermore, such duplicative litigation could occur every year, since a new agency-fee calculation is required every year based on that year's activities and expenses.

The court of appeals acknowledged "the union's problem of defending its actions in two separate fora," but suggested that there were ways this problem might be avoided without imposing an exhaustion requirement. (Pet. App. 11a-13a). The court's proposed solutions, however—negotiation of an agreed-upon arbitration mech-

anism, replacing arbitration with expedited court litigation, or use of class action procedures—are all highly impractical. To begin with, each one would require *all* agency-fee challengers to act as a single, unified group. That is a quite unrealistic expectation. The number and identity of such challengers vary from year to year, they work for different employers and live in different parts of the country, they do not all know each other, none of them has any means of communication with the entire group, they do not necessarily have the same motivations, concerns, or objections, and they certainly have no single spokesperson. Furthermore, there is no mechanism for ALPA even to negotiate with the entire group, much less to reach an agreement with all of its individual members. And, finally, agency-fee objectors have no incentive to cooperate with a union in solving the problem of duplicative litigation; it is, after all, to their advantage to have a choice of forums. Thus, contrary to the court of appeals, the only practical solution to the problem is to impose an exhaustion requirement.

Exhaustion would serve other salutary purposes as well. It is possible that, at least on some occasions, all parties will accept the decision of the arbitrator, thus obviating the need for court litigation. In addition, even if an arbitration decision is followed by litigation, the record of the arbitration proceeding, and the arbitrator's decision, should help to define the issues before the court and streamline both pretrial and trial procedures.<sup>10</sup> Cf. *McCarthy v. Madigan*, 503 U.S. at 145 (“[E]xhaustion of the admin-

<sup>10</sup> We argued below, and the district court held, that once a *Hudson* impartial decisionmaker has rendered a decision his findings of fact should be accepted by a reviewing court unless clearly erroneous, and only his legal conclusions would be reviewable *de novo*. The court of appeals did not reach that issue, and this Court has excluded it from its grant of certiorari. But even if one assumes that after the arbitration procedure has been exhausted the challengers would be entitled to a *de novo* judicial consideration of all issues, the arbitration record and decision should still be helpful in expediting such consideration.

istrative procedure may produce a useful record for subsequent judicial consideration, especially in a complex or technical factual context.”).

Finally, there are no significant countervailing considerations militating against an exhaustion requirement. In *McCarthy*, *supra*, the Court identified “three broad sets” of circumstances in which the interests of the individual weigh heavily against requiring administrative exhaustion. They are (1) when the “administrative remedy may occasion undue prejudice to subsequent assertion of a court action,” either because of the effect of the time delay involved or some other prejudicial factor, (2) where there is doubt as to whether the administrative procedure can provide an adequate remedy, and (3) “where the administrative body is shown to be biased or has otherwise predetermined the issue before it.” 503 U.S. at 146-49. None of these factors cuts against exhaustion here.

The time required to complete an agency-fee arbitration is generally not great, and in any event the challengers are protected against prejudice by the escrow requirement imposed by *Hudson*. The remedial authority of the arbitrator is as broad as a court's. And while challengers have occasionally contended that the American Arbitration Association is somehow biased, there is no basis whatever for that contention and it has been uniformly rejected.<sup>11</sup>

Respondents will no doubt attack the fairness of the AAA arbitration procedures, as they did in the court be-

<sup>11</sup> See *Grunwald v. San Bernardino City Unified School Dist.*, 994 F.2d 1370, 1376-77 (9th Cir.), *cert. denied*, 510 U.S. 964 (1993); *Weaver v. University of Cincinnati*, 970 F.2d 1523, 1534-35 (6th Cir. 1992), *cert. denied*, 507 U.S. 917 (1993); *Ping v. National Educ. Ass'n*, 870 F.2d 1369, 1373 (7th Cir. 1989); *Andrews v. Education Ass'n of Cheshire*, 829 F.2d 335, 340 (2d Cir. 1987); *Damiano v. Matish*, 830 F.2d 1363, 1371 (6th Cir. 1987); *Kidwell v. Transportation Communications Int'l Union*, 731 F. Supp. 192, 204 (D. Md. 1990), *aff'd in part, rev'd in part on other grounds*, 946 F.2d 283 (4th Cir. 1991), *cert. denied*, 503 U.S. 1005 (1992).

low, on the grounds that they do not follow the federal rules of evidence or provide the same broad discovery that is available in the federal courts. This Court has rejected such arguments as a basis for not enforcing an agreement to arbitrate federal statutory claims, even when the arbitration, unlike here, is a binding substitute for court litigation. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991). And *Hudson* itself states that "a full-dress administrative hearing, with evidentiary safeguards" is not required. 475 U.S. at 308 n.21.

Moreover, because the union has the burden of proof and must affirmatively present evidence explaining and justifying its agency-fee calculation, objectors would normally have little need for prehearing discovery. If, after the union's evidence is presented, an objector requires access to union records or information to prepare a response, he can request such evidence pursuant to Rule 14 of the American Arbitration Association rules, which empowers the arbitrator to require a party "to produce such additional evidence as the arbitrator may deem necessary." (J.A. 90). Furthermore, the issue here is merely whether the arbitration remedy should be exhausted before any lawsuit is brought; this Court has already made clear that the arbitration would not be "preclusive." 475 U.S. at 308 n.21. Thus, if in a particular case the challengers could show that the arbitration procedures were somehow inadequate or unfair, the court in a subsequent lawsuit would undoubtedly give them appropriate latitude to supplement the arbitration record.

In short, any fair weighing of the relevant prudential considerations tips the scale sharply in the direction of requiring exhaustion of the *Hudson* procedures. If such exhaustion is required, the impartial-decisionmaker procedure envisioned by that case will play a meaningful role in resolving agency-fee disputes, and minimize the extent to which the courts will be called upon to micromanage fee determinations. Without such a requirement, the pro-

cedure will become nothing more than a useless burden on the unions that are forced to provide it.

### CONCLUSION

For the reasons stated, the judgment below should be reversed and the case remanded to the court of appeals for further proceeding in accordance with this Court's ruling.

Respectfully submitted,

JERRY D. ANKER

(Counsel of Record)

CLAY WARNER

Air Line Pilots Association

Legal Department

1625 Massachusetts Avenue, N.W.

Washington, D.C. 20036

(202) 797-4087

Counsel for Petitioner

10

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No. 97-428

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1997

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*Petitioner,*

v.

ROBERT A. MILLER, *et al.*,

*Respondents.*

On Writ of Certiorari to the  
United States Court of Appeals  
for the District of Columbia Circuit

**BRIEF FOR RESPONDENTS**

RAYMOND J. LAJEUNESSE, JR.  
*Counsel of Record*  
National Right to Work Legal  
Defense Foundation, Inc.  
8001 Braddock Road, Suite 600  
Springfield, VA 22160  
(703) 321-8510

PHILIP F. HUDOCK  
P.O. Box 3796  
Reston, VA 20195  
(703) 757-9577

ATTORNEYS FOR RESPONDENTS

February 6, 1998

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**COUNTERSTATEMENT OF  
QUESTION PRESENTED**

Must nonmembers exhaust nonconsensual "arbitration" procedures adopted by a union before they can obtain a judicial determination of the lawfulness of the amount of the "agency fee" they must, under federal law, pay the union to keep their jobs?

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1997

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v.

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---

**On Writ of Certiorari  
to the United States Court of Appeals  
for the District of Columbia Circuit**

---

**BRIEF FOR RESPONDENTS**

---

**CONSTITUTIONAL AND STATUTORY  
PROVISIONS INVOLVED**

Besides the provisions the Brief for Petitioner ("ALPA's Br.") at 2-3 quotes, this case involves Article III of the Constitution of the United States and sections 2, Fourth and Fifth of the Railway Labor Act ("RLA"), 45 U.S.C. §§ 152, Fourth and Fifth (1988). Their pertinent text is set out in the Appendix, *infra*, 1a.

**COUNTERSTATEMENT OF THE CASE**

This is an action for declaratory, injunctive, and monetary relief concerning collective-bargaining agreement provisions that, under section 2, Eleventh of the RLA, 45 U.S.C. § 152, Eleventh (1988), compel nonunion pilots to pay "agency shop" charges to Petitioner Air Line Pilots Association ("ALPA") for its costs of statutory exclusive representation.

ALPA is a labor organization and exclusive bargaining representative for the pilots employed by Delta Airlines, Inc. ("Delta"). Respondents are 153 nonunion Delta pilots ("the pilots" or "the nonmembers"). (Pet. App. at 1a-2a.)<sup>1</sup> On November 1, 1991, ALPA and Delta entered into an agency-shop agreement requiring "as a condition of continued employment" that, beginning January 1, 1992, each pilot not a member of ALPA must pay the union "a service charge as a contribution for the administration of [the collective-bargaining] Agreement and the representation of such employee." The agreement specifies that the "service charge shall be an amount equal to the Association's regular and usual dues." (J.A. at 30-31, 35.)

The pilots filed their Complaint in the United States District Court for the District of Columbia on December 12, 1991, with a motion for a preliminary injunction against implementation of the agreement. The court denied this motion, and ALPA began collecting agency fees in January 1992. (*See id.* at 1.)

ALPA charged objecting nonmembers fees that were about 8% less than dues from January 1 through June 30, and about 17% less from July 1 through December 31, 1992, based, respectively, on its 1990 and 1991 expenditures. (Pet. App. at 2a.) Under its "Policies and Procedures Applicable to Agency Fees," ALPA did not escrow the full amount of objectors' fees, but only "an amount equal to 1.5 times ALPA's estimate of its total agency fee rebate obligation for that year." (J.A. at 67-68.)

---

<sup>1</sup> Three Respondents, Robert A. Miller, Kenneth Shackelford, and Robert V. Ziminsky, were named Plaintiffs in the original Complaint. (J.A. at 10.) The other 150 were permitted to intervene later by the district court, (*id.* at 115-33), after ALPA opposed and the court denied class certification, (R. 46; R. 59) ("R." refers to docket numbers on the district court's docket sheet). One Respondent is the personal representative of a deceased Intervenor. (J.A. at 7.)

Two counts of the Complaint are pertinent here. The Sixth Count alleges that "ALPA's agency fee procedure is not in compliance with the procedures required by the decisions of the United States Courts." (*Id.* at 25.) The Seventh alleges that ALPA unlawfully "collect[s] from non-union pilots . . . monies for certain activities not germane [*sic*] to collective bargaining." (*Id.* at 26-27.) ALPA's Answer admits that some of ALPA's "activities and expenditures are not germane to collective bargaining." (*Id.* at 38.) However, it denies that either ALPA's agency-fee procedure or the amount collected is unlawful. (*See id.* at 42-43.)

The pilots requested production of the files ALPA used in determining its germane and nongermane expenses for the fees charged in 1992, documents identifying its expenditure categories used in that determination and the activities under each category, and any guidelines used in establishing those categories and allocating expenses to them. ALPA objected to these requests. The Magistrate overseeing discovery denied the pilots' motion to compel production, because it was filed after a discovery deadline set earlier by the district court. (R. 40; R. 52.) The pilots timely objected to the Magistrate's order and moved to reopen discovery. (R. 53; R. 55.)

On August 2, 1993, the court granted ALPA summary judgment on four claims not relevant here. The court otherwise denied the parties' cross-motions for summary judgment "without prejudice to renewal." (Pet. App. at 62a-70a.) Simultaneously, it permitted the pilots to amend their Complaint to more specifically allege that ALPA's agency-fee procedures and amounts are unlawful and a claim for refund, with interest, of all monies collected unlawfully. (J.A. at 45-48.) The court also reopened discovery. (R. 58.) However, it never ruled on the objections to the Magistrate's order denying the pilots' Motion to Compel Production of Documents.

Meanwhile, on about July 23, 1993, ALPA sent the pilots its "1992 Statement of Germane and Nongermane Expenditures"

("SGNE"). (Pet. App. at 118a-57a; J.A. at 63, ¶ 2.) According to the SGNE, ALPA determined that 19% of its actual 1992 expenses was nongermane. (Pet. App. at 120a.) Under ALPA's "Policies and Procedures Applicable to Agency Fees," nonmember pilots who submitted objections to their 1992 fees then received an additional credit or rebate to bring their total reductions or rebates for the year to 19%. (See J.A. at 68-69.)

The "Policies and Procedures" provide that "[a]ny pilot who believes that ALPA has made an error in its application to him/her of the[se] policies and procedures . . . may request that his/her complaint be submitted to an independent arbitrator for hearing and decision." When a nonmember submits such a request, ALPA places "in escrow, pending the outcome of the arbitration, the portion of the pilot's agency fee that ALPA determines to be reasonably in dispute," not the entire disputed fee. (*Id.* at 69.)

A request for "arbitration" concerning ALPA's determination of the final 1992 reduction had to be sent to ALPA within thirty days of the SGNE's mailing, plus "a reasonable additional time for receipt." (*Id.* at 69, 79.) One hundred and seventy-four nonunion pilots, including the original Plaintiffs, submitted what ALPA considered requests for "arbitration" under its procedures. However, the Plaintiffs' letters objected to the "arbitration procedure" and "denial of Court review." They also stated that they were "sent to preserve my rights and without waiver of benefits I may have from" this litigation. (*Id.* at 71-78.)

Under ALPA's "Policies and Procedures," the American Arbitration Association ("AAA") appointed Louis Aronin as "arbitrator." (*Id.* at 69, 82.) The pilots' attorney asked the AAA not to proceed, because the matter was in litigation. (*Id.* at 95-97, 100-02.) Aronin rejected this request. (*Id.* at 105-06.) When the court subsequently denied the pilots' Motion for Preliminary Injunction against the "arbitration," (*id.* at 111-14), their counsel participated in the "arbitration" for the Plaintiffs and other pilots

who by that time had moved to intervene in this action. However, he entered only a "conditional appearance." (*Id.* at 134-35.)

The "arbitration" was conducted under the AAA's "Rules for Impartial Determination of Union Fees." (*Id.* at 69, 82.) Those rules "apply subject to . . . the internal procedures of the union." (*Id.* at 88, ¶ 1.) Under those rules, the AAA appoints "an arbitrator from a special panel of arbitrators experienced in employment relations." (*Id.*, ¶ 3.) Challengers cannot peremptorily disqualify that "arbitrator." (See *id.* at 89, ¶ 4.)

Moreover, "[c]onformity to legal rules of evidence [is] not . . . necessary." (*Id.* at 90, ¶ 14.) Challengers have no right to discovery, or to compel the testimony of union witnesses or production of union documents, but must ask the "arbitrator" to exercise his discretion to require the union to "produce such additional evidence as the arbitrator may deem necessary." (See *id.* at 88-94, particularly at 90, ¶ 14.) Before the hearing began, the pilots' counsel asked Aronin to permit discovery and require ALPA to identify its witnesses and exhibits in advance. Aronin denied discovery and advance identification. (*Id.* at 136.)

The "arbitration" hearing took three days, each a month apart. (Pet. App. at 71a.) The only witnesses were three ALPA employees. (R. 99, AAA Tr. at 3, 27, 179, 251, 481, 614.) Their testimony consisted of self-serving, general explanations of ALPA's activities, bookkeeping system, and preparation of the SGNE. (See R. 99, AAA Tr., *passim*.)<sup>2</sup> All documents ALPA introduced concerning its calculation of chargeable expenses

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<sup>2</sup> Only ALPA's Director of Finance testified about ALPA's calculation of chargeable expenses. He admitted that neither he nor anyone else canvassed individual employees, or even supervisors, to determine whether employees correctly charged time to the 1200 "project codes" used in identifying and calculating germane expenses. (R. 99, AAA Tr. at 377-79.) He also admitted he was "not in a position to give . . . breakdown details of the expenditures of any particular project code." (*Id.* at 517.)

were summaries or blank forms. (See Pet. App. at 118a-57a; R. 104, Ross Decl. at 7-11; R. 99, Exs. 8-9, 11-13A-E.) ALPA introduced no completed internal vouchers, requisition forms, expense statements, weekly time reports, or "New Project Request Forms."

Aronin issued his final decision on September 30, 1994. (Pet. App. at 71a-115a, 158a-61a.) He found that 158 pilots, including ninety-one Plaintiffs and Intervenors, were proper parties to the "arbitration." Thus, more than sixty Intervenor-Plaintiffs were *not* parties to the "arbitration." (*Id.* at 3a.) On the merits, Aronin ruled that ALPA's computation of germane 1992 expenses was "supported by the evidence and applicable Court decisions," with minor exceptions. He ordered ALPA to modify the agency fee by reallocating as nonchargeable a small number of expenses. (*Id.* at 114a-15a.) The recalculation reduced the chargeable percentage from 81% to 79.51%. (*Id.* at 161a.) Aronin upheld ALPA's treatment of its "input into" federal air-safety regulations as chargeable. (*Id.* at 108a.)

After ALPA filed the AAA decision with the district court, (J.A. at 4), the pilots served another request for production, asking for all documents identifying the nature of the activity and expenses in each "project code" ALPA used in allocating 1992 expenses as germane or nongermane, and the nature of expenses not included in those codes. ALPA refused to produce these documents, serving objections. (R. 89, Ex. 1.) The pilots moved to compel the requested production. (R. 89.)

On February 22, 1995, ALPA filed a second Motion for Summary Judgment, based on the "arbitration" record. (R. 98.) Besides opposing this motion on the merits, the pilots contended, with supporting declarations, that summary judgment could not be granted under Federal Rule of Civil Procedure 56(f), because ALPA refused discovery essential to their opposition. (R. 104.)

On April 18, 1995, the Magistrate granted in part the pilots' pending Motion to Compel Production. He required ALPA to

produce all documents identifying the nature of the activity and expenses included in twenty "project codes," and "New Project Request Forms" for fifty other codes, the pilots to select the codes from those ALPA treated as germane. (R. 109.) ALPA objected to this Order on April 27, 1995. (R. 114.) The court never ruled on these objections, and ALPA never produced the documents the Magistrate specified.

On April 28, 1995, the court granted ALPA summary judgment on all remaining claims, except the pilots' allegations that portions of the agency fees "were used for purposes not germane to collective bargaining." (Pet. App. at 44a-60a.) Additional briefing was ordered "on the issue of the impact of the arbitration on" those allegations. (*Id.* at 44a, 58a-60a.)

After further briefing, the court granted ALPA summary judgment "on the one remaining count." (*Id.* at 40a.) The court conceded that the pilots "never agreed by contract to be bound by a duty to arbitrate," and that "the RLA itself does not require the exhaustion of arbitration remedies." Nonetheless, it ruled that the pilots were required to exhaust ALPA's procedure "as a matter of judicial discretion," because it viewed exhaustion as necessary to "give effect to the procedures established by the Supreme Court in [*Teachers Local 1 v. Hudson*], 475 U.S. 292 (1986)." (*Id.* at 29a-32a.) The court also decided to defer to the arbitrator's findings on disputed factual issues, unless "clearly erroneous," and only "review *de novo* the arbitrator's legal conclusions." (*Id.* at 22a, 31a.) On the merits, the court accepted all of Aronin's factual findings and upheld all of his legal rulings. (*Id.* at 32a-39a.)

The United States Court of Appeals for the District of Columbia Circuit reversed in several respects. Most pertinent, the court of appeals held "that an employee who wishes to bring an action in federal court is not obliged to proceed first to arbitration, at the union's option," to challenge its calculation of lawfully chargeable expenses. The court concluded that there is "no *legal* basis for forcing into arbitration a party who never

agreed to put his dispute over federal law to such a process," and that there is nothing "in the *Hudson* majority opinion that even suggests that the Court thought it was putting protesting agency shop employees in that position." (*Id.* at 11a.)

The court of appeals also held, contrary to the "arbitrator," that ALPA may not lawfully charge the pilots for ALPA's "contacts with government agencies and Congress concerning the union's views as to appropriate federal regulation of airline safety." (*Id.* at 13a-15a.) The court also effectively reversed the district court's deference to the factual findings of the "arbitrator," because, even as to pilots who participated in ALPA's procedure, it reversed and remanded for discovery and "independent factual findings" on chargeability and accounting issues not decided by the court of appeals as a matter of law. (*Id.* at 15a, 17a-20a.) These "air safety" and deference issues were excluded from this Court's grant of certiorari. (*Compare* Pet. at i with Order Granting Cert.)

## SUMMARY OF ARGUMENT

I. In *Hudson*, this Court held that to collect agency fees a union must provide objecting nonmembers with a prompt opportunity to challenge the amount of the fee before an "impartial decisionmaker." That holding applies under the RLA, because the exaction of agency fees for nonbargaining purposes breaches the statutory duty of fair representation, and *Hudson* was grounded on both the First Amendment and basic considerations of fairness. *Hudson* also applies under the RLA because agency-shop agreements authorized by the RLA significantly impinge on First-Amendment rights.

*Hudson* did not expressly decide whether or not a nonmember must exhaust such a procedure before bringing a civil action challenging the agency fee if the "impartial decisionmaker" is privately appointed. Nothing in the *Hudson* majority opinion even hints that the Court intended that nonmembers could be forced to use a union-created nonjudicial procedure. The Court

did not even require unions to adopt arbitration to satisfy the requirement, but recognized that they could satisfy it by making expeditious judicial review possible. On the other hand, the Court did imply that exhaustion is not required by presuming that ordinary judicial remedies always remain available to objecting nonmembers. Moreover, an exhaustion requirement is inconsistent with the Court's concern that nonmembers obtain speedy resolution of their claims, since it delays judicial review of the union's calculation of the fee.

II. None of the ordinary circumstances under which exhaustion can be required exists here. The RLA does not mandate exhaustion, as ALPA concedes. The pilots have not agreed to submit their dispute with the union to its "arbitration" procedure, as ALPA also concedes, either explicitly, through a specific agreement, or implicitly, through the union-membership contract or the collective-bargaining agreement. And, ALPA's status as exclusive bargaining agent does not bind the pilots to its choice of forum, because ALPA is not an agent for nonmembers vis-à-vis itself.

Exhaustion cannot be required as a matter of judicial discretion unless exhaustion is consistent with congressional intent. Where Congress has indicated an intent that claims be judicially determined, a judicially imposed exhaustion requirement, based solely upon policy considerations, would violate Article III, section 1 of the Constitution.

ALPA and its *amici* identify no congressional intent that RLA agency-fee disputes should be submitted to any union-created remedy. However, Congress *has* indicated an intent that such cases be determined by the federal courts. Beginning with the seminal case of *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 207 (1944), this Court has held repeatedly that the federal labor statutes "contemplate[] resort to the usual judicial remedies of injunction and award of damages" for breach of the duty of fair representation. Thus, as in *Patsy v. Board of Regents*, 457 U.S. 496 (1982), with regard to similar constitu-

tional claims brought under 42 U.S.C. § 1983 (1988), the Court need not weigh policy considerations to determine that exhaustion cannot be required.

III. Even if it is assumed for the sake of argument that policy considerations can be weighed here, they are heavily weighted against exhaustion.

A. Exhaustion will not relieve the courts of having to determine agency-fee cases *de novo*, because *Hudson* held that an arbitrator's decision would not receive preclusive effect in any subsequent federal court action. Moreover, even if only limited judicial review were available where arbitration procedures are adequate and fair, that would merely require the courts to determine a different, but no less difficult, set of issues, *i.e.*, whether the particular proceeding was adequate and fair and whether the arbitrator's findings were clearly erroneous.

B. Unions are unlikely to face the "burden" of simultaneous arbitration and litigation, unless they fail to provide the prompt review that *Hudson* requires. Moreover, as the court of appeals recognized, unions can avoid arbitration completely simply by agreeing to class treatment of judicial claims and expediting discovery and other pre-trial proceedings. In any event, the costs of providing constitutional due process are not a permissible ground for failing to provide it.

C. Exhaustion is unlikely to resolve many cases for three reasons: (1) the many open questions as to how this Court's broad standards of chargeability should be applied; (2) the many difficult procedural questions that the courts will have to answer concerning the exhaustion requirement; and, (3) the understandable reluctance of nonmembers to accept the results of a so-called "arbitration" scheme in which they have no say in the selection of the decisionmaker and no right to discovery, despite the fact that all potential evidence is in their opponent's hands. The only sense in which exhaustion might

resolve some cases is that nonmembers' resources might be exhausted, but that result is contrary to federal policy.

D. Exhaustion is unlikely to simplify many cases, because a proceeding that lacks of rules of evidence, discovery as a matter of right, and compulsory process is not truly adversary. It, thus, neither reduces the need for discovery in a subsequent court action nor creates the type of record needed to decide these complex cases. Moreover, because labor arbitrators are unlikely to have the necessary expertise in deciding First-Amendment questions, their decisions under ALPA's scheme are unlikely to assist the courts.

E. An exhaustion requirement will unduly prejudice nonmembers, because: there is no definite time limit on proceedings under ALPA's procedure; the short filing deadline creates a high risk of forfeiture of claims; ALPA's scheme does not completely avoid the risk that challengers' monies will be spent unlawfully and deprives them of use of their monies for a substantial time; and, the "arbitrator" does not have authority to provide prospective injunctive relief.

IV. The "impartial decisionmaker" reviews the lawfulness of the union's final decision as to the amount of the fee that it takes from objecting nonmembers. Therefore, there is no merit to ALPA's and its *amici*'s argument that this is not an exhaustion case, but one in which the pilots' claim is not ripe until the "arbitrator" frees ALPA to spend money over their objection.

Moreover, ALPA's contention that the pilots must use its procedure is not only an exhaustion requirement. It is a requirement that would unlawfully invade the nonmembers' statutory and constitutional right not to associate with the union beyond payment of the costs of collective bargaining, because it would impose on them an additional aspect of union membership as a condition of their exercise of their right not to pay more.

## ARGUMENT

### I. This Court's *Hudson* Decision Does Not Require Nonmembers to Exhaust Union Agency-Fee "Arbitration" Schemes, But Merely Requires Unions Exercising Their Statutory Privilege of Collecting Coerced Fees to Make Available an Expeditious, Fair Alternative to Litigation.

ALPA's authority to require the pilots to pay an agency fee derives from RLA section 2, Eleventh, 45 U.S.C. § 152, Eleventh (1988). That section, however, is a "limited" exception to "the policy of full freedom of choice [of employees to join or not to join a union] embodied in" sections 2, Fourth and Fifth of the original RLA, 45 U.S.C. §§ 152, Fourth and Fifth (1988). *Machinists v. Street*, 367 U.S. 740, 750, 767 (1961).

*Street* and *Ellis v. Railway Clerks*, 466 U.S. 435, 448 (1984), construed section 2, Eleventh as limiting a union to charging objecting nonmembers for expenditures "necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues." That narrow construction was adopted "to avoid serious doubt" of the section's constitutionality under the First Amendment. *Street*, 367 U.S. at 749-50; accord *Ellis*, 466 U.S. at 444-45. As *Ellis* held, the "First Amendment does limit the uses to which the union can put funds obtained from dissenting employees." 466 U.S. at 455 (citing *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977)).

*Hudson* prescribed procedural safeguards that are "the constitutional requirements for the Union's collection of agency fees." 475 U.S. at 310. *Hudson* was a public-sector case. However, *Hudson* applies under the RLA for two reasons.

First, *Communications Workers v. Beck* held that "the exaction of fees beyond those necessary to finance collective-bargaining activities violates . . . the judicially created duty of fair representation." 487 U.S. 735, 742-44, 762-63 (1988).

Insofar as agency shops are concerned, that duty is identical under the RLA and section 9(a) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 159(a) (1988). See *Beck*, 487 U.S. at 745-47, 752; *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337 (1953). Contrary to the suggestion of *amicus* American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), (AFL-CIO's Br. at 3), *Hudson* grounded its entire analysis on "[b]asic considerations of fairness, as well as concern for the First Amendment rights at stake." 475 U.S. at 306 (emphasis added); see *id.* at 302-04 & nn.11-13. Thus, as the court of appeals held, there is "no reason why th[e] statutory duty of fair representation owed to nonmember agency shop employees carries any fewer procedural obligations than does [the] constitutional duty" under *Hudson*. (Pet. App. at 10a.)

Second, as the court of appeals also explained, "the *Hudson* requirements . . . obtain vis-a-vis unions who negotiate agency shop agreements with private employers covered by the RLA," because this Court held in *Railway Employees' Department v. Hanson*, 351 U.S. 225, 232 (1956), that "agency shop agreements under the RLA carr[y] the imprimatur of federal law." (Pet. App. at 8a.) In short, *Hudson* applies under the RLA, because the agency shop authorized by the RLA is itself "a significant impingement on First Amendment rights," *Ellis*, 466 U.S. at 455; accord *Hudson*, 475 U.S. at 307 n.20.<sup>3</sup>

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<sup>3</sup> ALPA and the AFL-CIO argue that the Court "should no longer follow" *Hanson* on the issue of governmental action, because the RLA "in no way coerces or encourages parties to enter into agency-shop agreements." (ALPA's Br. at 16 n.7; see AFL-CIO's Br. at 12 n.4.) The Court should decline to consider this issue because it was not presented below, (see Pet. App. at 8a), or in ALPA's Petition for Certiorari, (see Pet. at 10 n.4). See *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-46 (1992). The Court also should refrain from considering this issue because it is not necessary to decide the case, just as the Court declined to decide it for that reason in *Beck*, 487 U.S. at 761-62. ALPA concedes that there is "no reason why" (continued...)

One *Hudson* requirement is "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker." 475 U.S. at 310. ALPA attempted to meet this requirement by adopting an "arbitration" scheme. Its procedure does not itself require exhaustion; it merely provides that a nonmember "may" utilize it. (J.A. at 69.) Moreover, ALPA concedes that the opinion of the Court "in *Hudson* did not discuss the question of whether a fee payer must exhaust the impartial-decisionmaker procedure before challenging an agency-fee calculation in court," because "[t]hat issue was not raised on the facts presented." (ALPA's Br. at 16.)

Nonetheless, ALPA argues that exhaustion of its procedure should be required solely "on the basis of judicial discretion," because *Hudson* "required [it] to provide that procedure whether it wishes to do so or not." (*Id.* at 19.) ALPA contends that "one of the apparent purposes of *Hudson* is to establish an alternative dispute resolution procedure to relieve the courts of having to

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<sup>3</sup> (...continued)

[the] statutory duty of fair representation owed to nonmember agency shop employees carries any fewer procedural obligations than does a constitutional duty.'" (ALPA's Br. at 15-16 (quoting Pet. App. at 10a).)

Moreover, ALPA and the AFL-CIO are wrong. In the *RLA* cases and *Abood*, the Court found that legislative authorization and potential judicial enforcement of union decisions to use coerced fees for nonbargaining purposes would (*Hanson*, *Street*, and *Ellis*) and did (*Abood*) constitute "coercive power or . . . such significant encouragement . . . that the choice must in law be deemed to be that of the State," *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). See *Ellis*, 466 U.S. at 455-56; *Abood*, 431 U.S. at 232-33; *Street*, 367 U.S. at 746-50; *Hanson*, 351 U.S. at 232 & n.4. And, Congress' choice (or omission) of procedures to protect against prohibited expenditures also requires constitutional scrutiny: "While private misuse of a . . . statute does not describe conduct that can be attributed to the State, the procedural scheme created by the statute obviously is the product of state action," *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941 (1982). See *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 198-99 (1944).

'micromanage' agency-fee calculations." (*Id.* at 21.) *Amicus* National Education Association ("NEA") similarly argues that "*Hudson*, fairly read, contemplates that all objectors will proceed through the impartial decisionmaking process established by the union." (NEA Br. at 11.)

However, as the court of appeals recognized, nothing "in the *Hudson* majority opinion . . . even suggests that the Court thought it was putting protesting agency shop employees in th[e] position" of being forced to use a union-created nonjudicial procedure for reasons of judicial economy, or for any other reason. (Pet. App. at 11a.)<sup>4</sup> *Hudson* gave *only one* reason for

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<sup>4</sup> All but one of the United States Courts of Appeals and state supreme courts that have considered this issue agree with the D.C. Circuit that *Hudson* does not require exhaustion of agency-fee arbitration procedures. See *Knight v. Kenai Peninsula Borough Sch. Dist.*, 131 F.3d 807, 816 (9th Cir. 1997); *Bromley v. Michigan Educ. Ass'n*, 82 F.3d 686, 694 (6th Cir. 1996) (dictum), cert. denied, 117 S. Ct. 682 (1997); *Abrams v. Communications Workers*, 59 F.3d 1373, 1382 (D.C. Cir. 1995); *Food & Commercial Workers Local 951 v. Mulder*, 31 F.3d 365, 367-68 (6th Cir. 1994), cert. denied, 513 U.S. 1148 (1995); *Hohe v. Casey*, 956 F.2d 399, 408-09 (3d Cir. 1992); *Tierney v. City of Toledo*, 917 F.2d 927, 939-40 (6th Cir. 1990); *Gibney v. Toledo Bd. of Educ.*, 532 N.E.2d 1300, 1303-05 (Ohio 1988); see also *Brosterhous v. State Bar*, 906 P.2d 1242, 1251, 1255-58 (Cal. 1995) (no exhaustion required of attorneys challenging the amount of compulsory Bar dues); but see *Lancaster v. ALPA*, 76 F.3d 1509, 1521-22 (10th Cir. 1996). These are not "all public-sector cases brought under 42 U.S.C. § 1983" (1988), as ALPA's Brief at 18 n.9, asserts. *Abrams* and *Mulder* were both brought under the NLRA, 29 U.S.C. §§ 151-69 (1988).

Neither did *Hohe* hold that exhaustion "may be required as to accounting disputes concerning the amount spent for any activity," (ALPA's Br. at 18 n.9). *Hohe* held that a statutory exhaustion requirement was "invalid in its entirety," and that the district court erred in leaving to arbitration in the first instance the nonmembers' accounting "challenges to

(continued...)

holding that "the constitutional requirements for the Union's collection of agency fees include . . . a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker," 475 U.S. at 310. That reason was that the "nonunion employee, whose First Amendment rights are affected by the agency shop itself and who bears the burden of objecting, is entitled to have his objections addressed in an expeditious, fair, and objective manner." *Id.* at 307.

That *Hudson* also requires a union to escrow objecting nonmembers' disputed fees "while such challenges are pending," *id.* at 310, does not imply that exhaustion of a union's arbitration procedure is necessary, as the NEA argues, (NEA's Br. at 11-12). The principle that a "forced exaction followed by a rebate equal to the amount improperly expended is . . . not a permissible response to the nonunion employees' objections," *Hudson*, 475 U.S. at 305-06, applies regardless of the forum.<sup>5</sup>

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<sup>4</sup> (...continued)

the amount of the chargeable fee." 956 F.2d at 408-09, 416, *rev'g in pertinent part* 135 L.R.R.M. (BNA) 3026, 3028 (M.D. Pa. 1990). Nor did *Hudson v. Teachers Local 1*, 922 F.2d 1306 (7th Cir.), *cert. denied*, 501 U.S. 1230 (1991) ("*Hudson II*"), "squarely" hold that exhaustion is required, as ALPA and the AFL-CIO contend, (ALPA's Br. at 17-18; *accord* AFL-CIO's Br. at 11 n.3). As the Sixth Circuit has recognized, the "exhaustion issue was not before the [*Hudson II*] panel at all," only the adequacy of the union's notice; *Hudson II* was merely responding to an argument "that the correctness of the amount had to be adjudicated in court *before the fee could be collected and escrowed in the first instance*." *Bromley*, 82 F.3d at 694; see *Hudson II*, 922 F.2d at 1313-14.

<sup>5</sup> The Court's application of this principle in *Hudson* and *Ellis*, 466 U.S. at 443-44, implicitly overruled the earlier holding of *Railway Clerks v. Allen*, 373 U.S. 113, 120 (1963), that "dissenting employees . . . can be entitled to no relief until final judgment in their favor is entered."

Nothing prevents a union sued for allegedly overcharging agency fees from asking the court to require escrow of only that part of the fees that "a certified public accountant's verified breakdown of expenditures" shows represents "categories that no dissenter could reasonably challenge." *See id.* at 310. Nothing also prevents a union from expediting judicial proceedings "by making pre-trial concessions regarding discovery and other time-sensitive matters," (Pet. App. at 12a), and refraining from such delaying tactics as pre-trial motions and resisting discovery.

Indeed, as the court of appeals noted, "*Hudson* . . . did not require arbitration *per se*" to satisfy the impartial-decisionmaker requirement. (*Id.*) *Hudson* merely said that "an expeditious arbitration *might* satisfy the requirement." 475 U.S. at 308 n.21 (emphasis added). *Hudson* also recognized that a court can be the impartial decisionmaker: "[c]learly, . . . if a State chooses to provide extraordinarily swift judicial review for these challenges, that review would satisfy the requirement of a reasonably prompt decision by an impartial decisionmaker." *Id.* at 308 n.20. Thus, ALPA could avoid having both to provide arbitration and defend litigation simply by providing for expedited federal court review, instead of "arbitration," in its procedure.<sup>6</sup>

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<sup>6</sup> *Hudson* does not imply an exhaustion requirement because Justice White's concurring opinion, in dicta, said that a union providing for arbitration "should be entitled to insist that the arbitration procedure be exhausted before resorting to the courts." 475 U.S. at 311 (White, J., concurring). The *Hudson* majority evidently deliberately chose not to adopt that position. However, it specified that, if a nonmember uses arbitration, the "arbitrator's decision would not receive preclusive effect in any subsequent [civil] action," *id.* at 308 n.21. The juxtaposition of the majority's failure to state agreement with Justice White and its clarification that arbitration would not be preclusive suggests that the majority assumed that nonmembers are not required to exhaust arbitration remedies. *See Brosterhous v. State Bar*, 906 P.2d 1242, 1251 (Cal. 1995); (Pet. App. at 11a & n.1).

On the other hand, while nothing in *Hudson* suggests an exhaustion requirement, *Hudson* does indicate that nonmembers need not use arbitration if a union makes it available to satisfy the impartial-decisionmaker prerequisite to collecting agency fees. *Hudson* requires the union to provide an “*opportunity* to challenge the amount of the fee before an impartial decisionmaker.” *Id.* at 310 (emphasis added). Self-evidently, one is not compelled to use an “*opportunity*.” ALPA’s argument “confuses the union’s presumed responsibility to provide a means of dispute resolution with its ability to *force* non-union members to use its selected method.” *Food & Commercial Workers Local 951 v. Mulder*, 31 F.3d 365, 367 (6th Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995).

ALPA is correct that *Hudson* allows a union “to provide an *alternative*, nonjudicial mechanism for dealing with . . . agency-fee disputes.” (ALPA’s Br. at 15 (emphasis added).) However, an “*alternative*” “offer[s] or express[es] a choice.” *Webster’s New Collegiate Dictionary* 34 (1977). A *choice* presumes that a *second* option exists, *i.e.*, bypassing arbitration for litigation. See *Hohe v. Casey*, 956 F.2d 399, 409 (3d Cir. 1992).

*Hudson* itself clearly suggests that *nonmembers* still have a right to a judicial forum if a union provides a nonjudicial review procedure for objections. *Hudson* held that First-Amendment due process mandates that the “union have a responsibility to provide procedures . . . that facilitate a nonunion employee’s ability to protect his rights,” *despite* “*the availability of ordinary judicial remedies*.” The Court “presume[d] that *the courts remain available* as the ultimate protectors of constitutional rights.” *Id.* at 307 n.20 (emphasis added).

Moreover, as the Ninth Circuit concluded in *Knight v. Kenai Peninsula Borough School District*, the Court in *Hudson*

seemed most concerned with ensuring that nonmembers be able to obtain a speedy resolution without having to endure lengthy and protracted litigation in

court. To require nonmembers to exhaust arbitration *before* being entitled to file a federal court action would frustrate the intent of expediting the chargeability calculation and refund process.

131 F.3d 807, 816 (9th Cir. 1997) (emphasis added).

In sum, *Hudson* provides no basis for requiring exhaustion here and persuasively suggests that exhaustion is not required.

## **II. Exhaustion Cannot Be Required Here, Because There Is No Agreement to Arbitrate, and Mandatory Exhaustion Would Be Inconsistent with Congress’ Intent That Unfair Representation and Constitutional Claims Are Uniquely Within the Federal Courts’ Jurisdiction.**

Recognizing that “the majority opinion in *Hudson* did not discuss” the exhaustion issue, because it “was not raised on the facts presented,” ALPA relies primarily on general exhaustion principles. (See ALPA’s Br. at 16, 19-25.) However, neither ALPA nor either of its *amici* cites a single case in which this Court has required exhaustion of a nonconsensual, nonstatutory, nonjudicial procedure created by a private party to determine statutory and constitutional rights of an adversary. And, none of the ordinary circumstances under which exhaustion can be required exists here.

Where Congress specifically mandates, exhaustion is required.” *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992). However, ALPA and its *amici* do not contend that the RLA specifically mandates exhaustion of union-created procedures for agency-shop disputes. It does not. See 45 U.S.C. §§ 151-88 (1988).

Absent a statutory mandate, “a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.” *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960); accord, *e.g.*, *First Options of Chicago*,

*Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 648-49 (1986); *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368, 374 (1974). The agreement can be individual, e.g., in a securities registration application, see *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991), or in the union-member contract, see *Neal v. System Bd. of Adjustment*, 348 F.2d 722, 726 (8th Cir. 1965).<sup>7</sup> It also can be part of a collective-bargaining agreement, negotiated by a union as the employees' agent, to arbitrate employee-employer disputes under that agreement. See *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652-53 (1965).

However, ALPA does not claim that there is *any* agreement to arbitrate here. There is none. Nor does ALPA claim that its agency-fee "arbitration" is part of the collective-bargaining agreement with Delta. ALPA alone has instituted and now attempts to enforce its "arbitration scheme," with no input, approval or acquiescence from the pilots. Quite the contrary: Some of the pilots participated in ALPA's "arbitration" only under protest, after the district court denied an injunction to stop it. Others refused to participate at all. (Pet. App. at 2a-3a.)

Moreover, the pilots are nonmembers of ALPA. (*Id.* at 2a.) As such, they are "not bound by contract with the union to exhaust any formal internal union appeals before resorting to a judicial forum." *Soto Segarra v. Sea-Land Serv., Inc.*, 581 F.2d 291, 295 (1st Cir. 1978); see *Bagnall v. ALPA*, 626 F.2d 336, 341 (4th Cir. 1980), *cert. denied*, 449 U.S. 1125 (1981). Also, neither ALPA's status as the pilots' exclusive bargaining agent, nor a collective-bargaining agreement, could require the pilots, as nonmembers, to arbitrate their statutory and constitutional disputes with *itself*, as opposed to disputes with their employer. "ALPA is the agent for the nonmembers only vis-à-vis the

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<sup>7</sup> However, requirements that union members exhaust internal union remedies are limited both by statute and this Court's decisions. See 29 U.S.C. § 411(a)(4) (1988); *Clayton v. Auto Workers*, 451 U.S. 679 (1981).

employer, it is not an agent for the nonmembers vis-à-vis itself." (Pet. App. at 163a (Silberman, J., concurring in denial of reh'g)); see *Mulder*, 31 F.3d at 368-69; *Bagnall*, 626 F.2d at 341-42; see also *NLRB v. Maddox*, 415 U.S. 322, 324-26 (1974) (a union could not contractually waive employees' individual statutory rights where it had an adverse self-interest).

ALPA argues that, although there is neither a statutory mandate nor an agreement for arbitration, "whether administrative remedies must be exhausted is a matter committed to 'sound judicial discretion.'" (ALPA's Br. at 19 (quoting *McCarthy*, 503 U.S. at 144).) ALPA also contends that there are "two separate and independent reasons that can support a requirement of exhaustion—one being 'protecting administrative agency authority' and the other being 'promoting judicial efficiency.'" (*Id.* at 20 (quoting *McCarthy*, 503 U.S. at 145).) The first of these considerations clearly does not apply here, since neither ALPA nor the AAA is an administrative agency. ALPA argues that exhaustion should be required *solely* because of policy considerations of judicial efficiency. (See *id.* at 20-25.)

ALPA ignores the primary principle of the exhaustion doctrine. "Of 'paramount importance' to any exhaustion inquiry is congressional intent." *McCarthy*, 503 U.S. at 144 (quoting *Patsy v. Board of Regents*, 457 U.S. 496, 501 (1982)). Even "in th[e] field of judicial discretion, appropriate deference to Congress' power to prescribe the basic procedural scheme under which a claim may be heard in a federal court requires fashioning of exhaustion principles in a manner consistent with congressional intent and any applicable statutory scheme." *Id.*

Therefore, contrary to ALPA's assumption, "policy considerations alone cannot justify judicially imposed exhaustion unless exhaustion is consistent with congressional intent." *Patsy*, 457 U.S. at 513; see *id.* at 501-02 & n.4 (followed in *McCarthy*, 503 U.S. at 144). In particular, "the perceived burden that . . . actions impose on federal courts" "alone is not sufficient to justify a judicial decision to alter congressionally imposed

jurisdiction." *Id.* at 512 & n.13; *cf. La Buy v. Howes Leather Co.*, 352 U.S. 249, 256, 259 (1957) (neither a crowded calendar nor the presence of complex issues warrants appointment of a special master in a federal action over a party's objections); *In re Bituminous Coal Operators' Ass'n*, 949 F.2d 1165, 1168-69 (D.C. Cir. 1991) (R. Ginsburg, J.) (same).

Policy considerations alone are insufficient for the federal courts to impose exhaustion, because those courts "are vested with a 'virtually unflagging obligation' to exercise the jurisdiction given them." *McCarthy*, 503 U.S. at 146 (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817-18 (1976)). The source of that obligation is Article III, section 1 of the Constitution, which "preserves to litigants their interest in an impartial and independent **federal adjudication** of claims within the judicial power of the United States." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 850 (1986) (emphasis added); see *Pacemaker Diagnostic Clinic v. Instromedix, Inc.*, 725 F.2d 537, 541 (9th Cir.) (Kennedy, J., en banc), *cert. denied*, 469 U.S. 824 (1984).

There are only four exceptions to Article III's rule that Article III judges must decide federal cases. None applies here. The first two, "military tribunals" and "territorial courts," are clearly inapplicable. See *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 585 (1985). The third is when parties *waive* their right to a judicial determination. See *Schor*, 478 U.S. at 848-49. That condition is not met here, because the pilots did not consent to determination of their statutory and constitutional claims by ALPA's "arbitrator." See *supra* pp. 20-21.

The fourth exception to the rule of Article III adjudication is where a "statutory cause of action inheres in, or lies against, the Federal Government in its sovereign capacity" or where

"Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, [has] create[d] a seemingly 'private' right that is so

closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary." If a statutory right is not closely intertwined with a federal regulatory program Congress has power to enact, and if that right neither belongs to nor exists against the Federal Government, **then it must be adjudicated by an Article III court.**

*Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53-55 (1989) (quoting *Thomas*, 473 U.S. at 593-94) (alteration in original) (emphasis added) (citation omitted). That returns the issue here to the controlling question of congressional intent.

The statutes mandating federal subject-matter jurisdiction upon which the pilots rely—28 U.S.C. §§ 1331 and 1337(a) (1988)—contain no explicit, or judicially divined, expression of congressional intent that arbitration procedures be exhausted in any case. Also, ALPA and its *amici* identify no congressional intent that agency-fee disputes under the RLA should be submitted to arbitration, much less union-created *ersatz* "arbitration." The closest they come is that ALPA mentions that "Congress has expressly approved contract grievance procedures as a preferred method for settling disputes." (ALPA's Br. at 20 (quoting *Republic Steel*, 379 U.S. at 653).)

However, the congressional preference to which ALPA adverts is for "adjustment by a method *agreed* upon by the parties . . . for settlement of grievance **disputes arising over the application or interpretation of an existing collective-bargaining agreement**," *i.e.*, disputes between employees and/or unions on the one hand and employers on the other. 29 U.S.C. § 173(d) (1988) (emphasis added); see *Republic Steel*, 379 U.S. at 652-53. Here, the pilots have not agreed to use ALPA's procedure, and this is not a dispute over a collective-bargaining contract.

Congress has done more than refrain from expressly approving union "arbitration" procedures as the preferred

method for settling agency-fee disputes. In the RLA, as interpreted by this Court, Congress also has indicated an intent that such cases be determined by the federal courts.

A claim that a union unlawfully exacts agency fees under the RLA for purposes other than collective bargaining raises issues under both the statute and the First Amendment. *See Ellis*, 466 U.S. at 445-48, 455-56. It also is a claim of breach of the union's statutory duty of fair representation. *Communications Workers v. Beck*, 487 U.S. 735, 742-44 (1988). In *Steele v. Louisville & Nashville R.R.*, to avoid constitutional questions, this Court found that the RLA imposes that duty on an exclusive bargaining representative. 323 U.S. 192, 198-203 (1944).

*Steele* also held that an unfair representation claim "is not one . . . determinable under the administrative scheme set up by the Act or restricted by the Act to voluntary settlement by recourse to the traditional implements of mediation, conciliation and arbitration." *Id.* at 204-06 (citations omitted); *see Beck*, 487 U.S. at 743. Rather, the Court concluded,

the right here asserted, to a remedy for a breach of the statutory duty of the bargaining representative to represent and act for the members of a craft, is of judicial cognizance. That right would be sacrificed or obliterated if it were without the remedy which courts can give for breach of such a duty or obligation and which it is their duty to give in cases in which they have jurisdiction. . . .

. . . . [T]he statute contemplates resort to the usual judicial remedies of injunction and award of damages when appropriate for breach of that duty.

*Id.* at 207 (emphasis added); *see Beck*, 487 U.S. at 743 ("the RLA . . . leaves it to the courts to determine the validity of [union] activities challenged under the Act"). Congress, which obviously is aware of *Steele's* construction of the RLA in 1944,

has not seen fit to amend the Act to limit or qualify the courts' jurisdiction over unfair representation cases.

Furthermore, like 42 U.S.C. § 1983 (1988), the purpose of the duty of fair representation is to interpose the federal courts as the "paramount" guardians of individual rights. *Compare Breininger v. Sheet Metal Workers Local 6*, 493 U.S. 67, 74-75 (1989) and *Vaca v. Sipes*, 386 U.S. 171, 181-82 (1967) with *McDonald v. City of West Branch*, 466 U.S. 284, 290 (1984) and *Patsy*, 457 U.S. at 503-04. Indeed, because the "right of the individual employee to be made whole is '[o]f paramount importance,'" that "a breach of the duty of fair representation might also be an unfair labor practice [normally within the exclusive jurisdiction of the National Labor Relations Board ("NLRB")] is . . . not enough to deprive a federal court of jurisdiction over the fair representation claim." *Breininger*, 493 U.S. at 75 (quoting *Bowen v. United States Postal Serv.*, 459 U.S. 212, 222 (1983)); *see Beck*, 487 U.S. at 743.<sup>8</sup>

Thus, this case is similar to *Patsy*, in which the Court reaffirmed "categorically that exhaustion is not a prerequisite to an action under § 1983," policy considerations notwithstanding. 457 U.S. at 500-01, 512-16; *see Felder v. Casey*, 487 U.S. 131, 146-50 (1988). Public-sector agency-shop cases are brought under section 1983. *See, e.g., Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 513 (1991); *Bromley v. Michigan Educ. Ass'n*, 82 F.3d 686, 688, 692 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 682 (1997). *Patsy* and *Felder* are controlling on the exhaustion issue in those cases. *See Knight v. Kenai Peninsula Borough Sch.*

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<sup>8</sup> Like the vast majority of the courts, *see supra* note 4, the Board has rejected as "meritless" a union's argument that it should await exhaustion of "the arbitration procedure set forth in [the union's] dues-objection policy" before proceeding on claims that the union has extracted agency fees for purposes other than collective bargaining and contract administration. *California Saw & Knife Works*, 320 N.L.R.B. 224, 224 n.1, 276-77 (1995), *enforced*, 157 L.R.R.M. (BNA) 2287 (7th Cir. Jan. 14, 1998).

*Dist.*, 131 F.3d 807, 816 (9th Cir. 1997); *Hohe v. Casey*, 956 F.2d 399, 408-09 (3d Cir. 1992); *Tierney v. City of Toledo*, 917 F.2d 927, 939-40 (6th Cir. 1990); *Brosterhous v. State Bar*, 906 P.2d 1242, 1255-58 (Cal. 1995); *Gibney v. Toledo Bd. of Educ.*, 532 N.E.2d 1300, 1303-05 (Ohio 1988).

This Court has treated the rights of private- and public-sector employees forced to pay agency fees as essentially coextensive. *See, e.g., Lehnert*, 500 U.S. at 516, 523 (opinion of the Court), 555 (Scalia, J., concurring); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 229-32 (1977). Thus, to hold that exhaustion can be required here, the Court would either have to treat private- and public-sector employees in radically different ways for the first time, or overrule *Patsy* and *Felder*.

ALPA and the NEA argue that an exhaustion requirement in agency-fee cases is not inconsistent with *Patsy*, because *Patsy* concerned state remedies, but, they say, the "impartial-decision-maker procedure required by *Hudson* . . . is a federal remedy." (ALPA's Br. at 18 n.9; accord NEA's Br. at 17.) However, the principles of the exhaustion doctrine *Patsy* applied are the same for state and federal remedies. Compare *McCarthy*, 503 U.S. at 144 with *Patsy*, 457 U.S. at 501-02 & n.4.

Moreover, ALPA's "arbitration" is not a federal administrative remedy. It is a union-created and -controlled private remedy, voluntarily adopted by ALPA to satisfy a constitutional and statutory prerequisite to its collection of agency fees. Clearly, if federal courts need and ought not defer to a federal agency in agency-fee cases arising under the duty of fair representation, as *Beck* held, 487 U.S. at 743-44, with even greater reason they need and ought not defer to a private "arbitration" set up by the very union the employees claim violated that duty.

In sum, as in *Patsy*, exhaustion cannot be required here, and there is no occasion to determine the weight of the policy considerations urged by ALPA and its *amici*, because exhaustion

is inconsistent with Congress' intent that the federal courts have a paramount role in the determination of constitutional and duty-of-fair-representation claims.

### III. Even If It Is Assumed *Arguendo* That Policy Considerations Are Relevant, They Suggest That Exhaustion Should Not Be Required in Agency-Fee Cases.

Where congressional intent does not militate against an exhaustion requirement, as it does here, "federal courts must balance the interest of the individual in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion." *McCarthy*, 503 U.S. at 146. Although *Patsy* held that exhaustion could not be required under section 1983 as a matter of judicial discretion, due to its inconsistency with congressional intent, the Court also concluded that "policy considerations" could not justify judicially imposed exhaustion there because they did "not invariably point in one direction." 457 U.S. at 512-13. Assuming for the sake of argument that policy considerations can be weighed at all here, they are at least equally inconclusive, if not heavily weighted *against* exhaustion.

#### A. Exhaustion Will Not Relieve the Courts of Having to "Micromanage" Agency-Fee Cases.

The first policy consideration ALPA advances is that exhaustion purportedly would "relieve the courts of having to 'micromanage' agency-fee calculations." (ALPA's Br. at 21.) Yet, ALPA admits that "this Court has already made clear that the arbitration would not be 'preclusive.'" (*Id.* at 24 (quoting *Hudson*, 475 U.S. at 308 n.21).) Thus, ALPA apparently means that judicial review of agency-fee calculations will be limited to the "arbitration" record on a "clearly erroneous" basis unless "in a particular case the challengers could show that the arbitration procedures were somehow inadequate or unfair." (*See id.* at 22 n.10, 24.)

That suggestion presumes the answer to a question that "was excluded from this Court's grant of certiorari," (*id.* at 9 n.6), *i.e.*, whether judicial review is limited, as the district court held, (Pet. App. at 22a), or *de novo*, as the court of appeals recognized, (*id.* at 15a, 17a-20a). ALPA's suggestion also is erroneous, because, in ruling that an "arbitrator's decision would not receive preclusive effect in any subsequent . . . action" in federal court challenging an agency fee, *Hudson* cited *McDonald v. City of West Branch*, 466 U.S. 284 (1984). 475 U.S. at 308 n.21.

*McDonald* held that, "in a § 1983 action, a federal court should not afford . . . collateral-estoppel effect to an award in an arbitration proceeding." 466 U.S. at 292. *McDonald* also described "a rule that would have required federal courts to defer to an arbitrator's decision" as one that would "*preclude* a subsequent suit in federal court." *Id.* at 288-89 (emphasis added). Thus, per *McDonald*, *Hudson*'s ban on deference to arbitration embraces both legal and factual issues. See *McDonald*, 466 U.S. at 287 n.5 (collateral estoppel applies to issues of fact), 292 & n.13 ("an arbitration proceeding cannot provide an adequate substitute for a judicial *trial*"; it "is the duty of courts to assure the *full* availability of th[e judicial] forum") (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 60 n.21 (1974)) (emphasis added); see also *Clayton v. Auto Workers*, 451 U.S. 679, 693 (1981) ("exhaustion [of union remedies] would not lead to significant savings in judicial resources, because regardless of the outcome of the internal appeal, the employee would still be required to prove *de novo* in his . . . suit that the union breached its duty of fair representation").

Furthermore, even if ALPA were correct that only limited judicial review is available where agency-fee arbitration procedures are adequate and fair, that would merely mean that the federal courts would have to "micromanage" a different, but no less difficult, set of issues in these cases, *i.e.*, the adequacy and fairness of the particular "arbitration" proceeding and whether the decisionmaker's factual findings were clearly erroneous.

## B. The Purported Burden of Simultaneous Arbitration and Litigation Is Improbable and Irrelevant.

ALPA next complains that, unless exhaustion is required, "a union could be confronted by *simultaneous* agency-fee challenges, in court and before a *Hudson* impartial decisionmaker." (ALPA's Br. at 21.) The NEA adds that simultaneous litigation and arbitration "would be the most expensive and burdensome system imaginable." (NEA's Br. at 13-14.) However, unless a union fails to provide the "expeditious arbitration" and "reasonably prompt decision" *Hudson* requires, 475 U.S. at 307, 308 n.21, arbitration is likely to be concluded before the merits are at issue in a court action.

Moreover, if, instead of opposing class certification and discovery, as ALPA did here, see *supra* note 1 & pp. 3, 6-7, a union agreed to class treatment of judicial claims and willingly provided discovery, arbitration would be unnecessary, as the court of appeals pointed out. (Pet. App. at 12a-13a.) It is highly unlikely that any objecting nonmembers would opt out of a class action and insist on submitting their claims *pro se* or through personal counsel to a privately appointed decisionmaker if notified that their claims would be determined by the federal courts in an action in which the class representatives would provide counsel.

This action was filed more than a year and a half before ALPA's internal proceedings began. (*Compare* J.A. at 1 with *id.* at 71-78.) ALPA *chose* to conduct the latter over the pilots' objections. (See *id.* at 103-04.) ALPA contends that it had to proceed, because "fee payers who were not litigants in this case requested arbitration." (ALPA's Br. at 21.) However, it is implausible that any of those fee payers would have insisted on pursuing ALPA's procedure had they been notified that the federal courts would decide their challenges.

In any event, the union's costs and administrative burdens in meeting the "impartial decisionmaker" requirement are

irrelevant. The "procedures mandated by *Hudson* are to be accorded all nonmembers of agency shops regardless of whether the union believes them to be excessively costly." *Andrews v. Cheshire Educ. Ass'n*, 829 F.2d 335, 339 (2d Cir. 1987); accord *Lowary v. Lexington Local Bd. of Educ.*, 903 F.2d 422, 431 (6th Cir.), cert. denied, 498 U.S. 958 (1990); see *Keller v. State Bar*, 496 U.S. 1, 16-17 (1990) (quoting with approval *Keller v. State Bar*, 767 P.2d 1020, 1046 (Cal. 1989) (Kaufman, J., dissenting), rev'd, 496 U.S. 1 (1990)); *Ellis*, 466 U.S. at 444.

Furthermore, the unions' complaints about the burdens and costs of satisfying *Hudson* are hypocritical. They can reduce those burdens by not engaging in dilatory litigation tactics and providing for expedited judicial proceedings, instead of "arbitration," in their procedures. See *supra* p.17. Moreover, a union has those burdens only because "it *voluntarily* seeks to collect service fees from the non-union members." See *Tierney v. City of Toledo*, 824 F.2d 1497, 1503 n.2 (6th Cir. 1987) (emphasis added).

### C. Exhaustion Is Unlikely to Resolve Many Cases.

The third policy consideration that ALPA and its *amici* propose is that, "on some occasions, all parties will accept the decision of the arbitrator, thus obviating the need for court litigation." (ALPA's Br. at 22; see AFL-CIO's Br. at 15-16; NEA's Br. at 14, 17.) This is improbable for three reasons.

First, as ALPA notes, this Court's "broad standards [as to what is chargeable or not] have proven to be distressingly difficult to apply." (ALPA's Br. at 13); see, e.g., *Bromley*, 82 F.3d at 691; *Beckett v. ALPA*, 59 F.3d 1276, 1280-81 (D.C. Cir. 1995) (Silberman, J., concurring). Thus, until this Court settles more clearly what activities are lawfully chargeable, nonmembers are likely to continue to seek resolution of chargeability issues by the federal courts.

Second, as in *Patsy*, "it is by no means clear that judicial discretion to impose an exhaustion requirement . . . would lessen the caseload of the federal courts, at least in the short run," for another reason. 457 U.S. at 513 n.13. That is, the courts still would have to answer "difficult questions concerning the design and scope of [the] exhaustion requirement," including

the standards for judging the kinds of [arbitration] procedures that should be exhausted; what tolling requirements and time limitations should be adopted; what is the res judicata and collateral estoppel effect of particular [arbitration] determinations; [and] what consequences should attach to the failure to comply with procedural requirements. . . . These and similar questions . . . would create costly, remedy-delaying, and court-burdening litigation if answered incrementally by the judiciary.

*Id.* at 513-14 (footnotes omitted).

Third, as the court of appeals recognized, nonmembers are unlikely to accept the decisions of "arbitrators" under the particular scheme at issue here, because they understandably question the fairness of a procedure in which they have no say in the selection of the decisionmaker and no right to discovery, even though all potential evidence is solely in the union's hands. (See Pet. App. at 11a-12a); see also Thomas R. Haggard, *Union Security in the Context of Labor Arbitration*, 1994 Nat'l Acad. Arb. Proc. 110, 123 (same). This scheme, which is used by most unions, (NEA's Br. at 12 n.10.), is not true arbitration.<sup>9</sup>

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<sup>9</sup> The NEA asserts that the question of whether use of an AAA "arbitrator" satisfies *Hudson* "was not raised below and is not encompassed in the grant of certiorari." (NEA's Br. at 13 n.10.) The question is not whether the AAA scheme satisfies *Hudson*, but whether this is the type of procedure that permits judicial deference to it. See *McCarthy*, 503 U.S. at (continued...)

*Mutual* "selection of the arbitrators by the parties to the dispute" is "a fundamental characteristic of arbitration." *Associated Plumbing & Mech. Contractors v. Plumbers Local 447*, 811 F.2d 480, 483-84 (9th Cir. 1987); see Frank Elkouri & Edna A. Elkouri, *How Arbitration Works* 135-37 (4th ed. 1985); Owen Fairweather, *Practice and Procedure in Labor Arbitration* 79-90 (2d ed. 1983) (cited in *Hudson*, 475 U.S. at 308 n.21). Indeed, a scholar cited by ALPA and the NEA, (ALPA's Br. at 19 n.9; NEA's Br. at 19), in an article they do not cite, includes "*mutual* selection of the arbitrator" as one of the "*minimum* standards of arbitral procedural justice." Martin H. Malin, *Arbitrating Statutory Employment Claims in the Aftermath of Gilmer*, 40 St. Louis U. L.J. 77, 96-99 (1996) (emphasis added).<sup>10</sup>

ALPA contends that "there is no basis" for attacking the impartiality of the AAA, because such attacks have "been uniformly rejected." (ALPA's Br. at 23 & n.11.) The cases ALPA cites, though, merely held that the AAA's procedure satisfies *Hudson's* requirement for an "impartial decisionmaker"

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<sup>9</sup> (...continued)

146-49. This question was raised below. (See Appellants' Br. at 18-19, 21-23.) It also is "fairly included" within the question presented, Sup. Ct. R. 14.1(a), because, before the Court can require exhaustion as a matter of judicial discretion, it must address the adequacy of the procedure. See *McCarthy*, 503 U.S. at 146-49. In any event, a respondent here is "entitled . . . to urge any grounds which would lend support to the judgment below." *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 419 (1977).

<sup>10</sup> Malin says that mutual selection is "impractical" in agency-fee disputes, because they "often involve numerous objecting fee-payers." Malin, *supra*, at 99. However, he also suggests that "candidates for inclusion on employment arbitration rosters" should be required to have equal numbers of "references from employer and employee advocates." *Id.* at n.104. Similarly, arbitrators could easily be mutually selected by the union and an advocate of the interests of nonmembers, e.g., the National Right to Work Legal Defense Foundation.

in the abstract. They did not consider whether that scheme is adequate to support *forced* arbitration. One ground Malin gives to justify the lack of mutual selection under the AAA's procedure is that "the union security fee objector is not obligated to use the arbitration procedure, but may bypass it and sue the union in federal court." Malin, *supra*, at 99.

Contrary to ALPA's speculation, nonmembers are *more* likely to accept the decisions of arbitrators, thus making court litigation unnecessary, if both options are available in the first instance, because then unions are more likely to adopt arbitration procedures that will satisfy nonmembers. At the least, as the Court said in *Patsy*, "it is uncertain whether the present 'free market' system, under which litigants are free to pursue administrative remedies if they truly appear to be cheaper, more efficient, and more effective, is more likely to induce the creation of adequate remedies than a . . . standard under which plaintiffs have no initial choice." 457 U.S. at 513 n.15.

The only sense in which an exhaustion requirement here might lead to reduced litigation is that "exhaustion might deplete the employee's energy and resources to the point where he chooses not to pursue his [statutory] claim in court, but that result is surely inconsistent with federal policy." *Clayton v. Auto Workers*, 451 U.S. 679, 693 n.22 (1981).<sup>11</sup>

#### D. Exhaustion Is Unlikely to Simplify Many Cases.

ALPA and its *amici* also argue that the "record of the arbitration proceeding, and the arbitrator's decision, should help to define the issues before the court and streamline both pretrial

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<sup>11</sup> Contrary to the implication of ALPA's Brief at 14, the National Right to Work Legal Defense Foundation does not have the resources to support a lawsuit for every nonmember who wants to challenge his agency fees. In this case, the Foundation provided the pilots with an attorney only after they had filed their Notice of Appeal. (See R. 138; R. 140.)

and trial procedures." (ALPA's Br. at 22; see AFL-CIO's Br. at 16-18; NEA's Br. at 14, 17.) This really means that the unions want to use "arbitration" to avoid disclosing the relevant facts to their litigation opponents and having to meet their burden of proof, under rules of evidence, in a truly adversary hearing before an Article III judge qualified to determine what speech and association they can lawfully compel.

ALPA discloses the unions' true agenda by contending that, "because the union has the burden of proof and must affirmatively present evidence explaining and justifying its agency-fee calculation, objectors would normally have little need for prehearing discovery." (ALPA's Br. at 24.) The NEA adds that, because "objectors have already received a notice informing them of the union's expenditures, there is no reason why [AAA] Rule 14 should not enable objectors to obtain sufficient 'discovery.'" (NEA's Br. at 15 n.11 (citation omitted).) Rule 14, of course, is the rule under which discovery is available to nonmembers only at the discretion of the AAA-appointed "arbitrator"—and under which the "arbitrator" in this case denied the pilots any discovery. (J.A. at 90, ¶ 14; J.A. at 136.)

The AFL-CIO further reveals the unions' agenda here by asserting that in a subsequent court action "the objecting fee payer can reasonably be required to identify in what respects the union's evidence accepted by the arbitrator is insufficient to justify the fee." (AFL-CIO's Br. at 18.) That would impermissibly shift the burden of proof to the pilots. This Court has repeatedly held that, "*always*, the union bears the burden of proving the proportion of chargeable expenses to total expenses." *Lehnert*, 500 U.S. at 524 (emphasis added) (citing cases). "The nonmember's 'burden' is simply the obligation to make his objection known," *Hudson*, 475 U.S. at 306 n.16, in general terms. See *Abood*, 431 U.S. at 241 & n.42. Moreover, the AFL-CIO does not explain how nonmembers can specify which union evidence is insufficient if they have not had discovery.

"[R]ules of evidence that treat hearsay with skepticism, and discovery procedures that allow litigants to probe their adversaries' cases in depth prior to hearing," are particularly necessary in challenging the misuse of agency fees. See *Bromley*, 82 F.3d at 693-94. *Lehnert* requires "a case-by-case analysis in determining which activities a union constitutionally may charge to dissenting employees." 500 U.S. at 519. These are "difficult" mixed questions of fact and law that cannot be determined without "factual concreteness and adversary presentation" on an "evidentiary record" providing "specificity in the description of [the] activities." *Abood*, 431 U.S. at 236 & n.33. And, the union alone possesses the facts and records that would show whether its calculations satisfy the constitutional test for chargeability and its burden of proof. See, e.g., *Hudson*, 475 U.S. at 306.

Contrary to the NEA's implication, the "amount of financial disclosure a union must provide to a non-member to enable her to decide whether or not to object . . . is not necessarily sufficient to determine the propriety of the agency fee." *Tierney v. City of Toledo*, 917 F.2d 927, 938 n.9 (6th Cir. 1990). That is so, because *Hudson* requires advance disclosure of only "the major categories of expenses." 475 U.S. at 307 n.18. Here, ALPA's SGNE, while it disclosed some 1200 "project codes," merely identified each code with a short, cryptic title which seldom showed the nature of the activity involved. (See Pet. App. at 118a-57a.)

Thus, because the pilots were denied discovery, and even advance identification of ALPA's witnesses and exhibits, and could not compel the testimony of union witnesses or production of union documents at the hearing under ALPA's procedure, they were unable effectively to cross-examine, impeach, or rebut ALPA's case. Moreover, that case consisted solely of hearsay: "summaries of documents that were not presented in evidence and had not been made available for inspection by [the] dissenters prior to the arbitration hearing," *Bromley*, 82 F.3d at 693, and general, self-serving testimony of ALPA employees. See *supra* pp. 5-6 & note 2.

In short, the pilots and their attorney were mere spectators at a "show trial." Such a proceeding neither significantly reduces the need for discovery in the subsequent court action nor creates a record of the type that can be relied upon to decide a motion for summary judgment. See *Bromley*, 82 F.3d at 693-94.

ALPA relies on the fact that "*Hudson* itself states that 'a full-dress administrative hearing, with evidentiary safeguards' is not required." (ALPA's Br. at 24 (quoting 475 U.S. at 308 n.21).) However, *Hudson* merely says that "a full-dress administrative hearing . . . is [not] part of the 'constitutional minimum'" for the initial collection of agency fees. 475 U.S. at 308 n.21. It does not hold that discovery and evidentiary safeguards are unnecessary to protect nonmembers' rights where, after the fees have been collected, arbitration is asserted as a prerequisite to or substitute for "ordinary judicial remedies," *id.* at 307 n.20.

ALPA also argues that this Court has rejected the lack of rules of evidence and "broad discovery" "as a basis for not enforcing an agreement to arbitrate federal statutory claims, even when the arbitration . . . is a binding substitute for court litigation." (ALPA's Br. at 24.) ALPA cites *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). However, *Gilmer*, unlike this, was a case in which the plaintiff individually agreed to arbitrate his statutory claims. *Id.* at 23. "By agreeing to arbitrate a statutory claim, a party . . . trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (emphasis added). That a party should be held to his agreement to waive the rules of evidence and civil procedure does not mean that a person with a statutory or constitutional claim can be forced to give up those procedural protections.

*Alexander v. Gardner-Denver Co.* and *McDonald v. City of West Branch* held that arbitration "cannot provide an adequate substitute for a judicial proceeding in protecting . . . federal statutory and constitutional rights" where an employee has not

voluntarily waived his statutory cause of action. *McDonald v. City of West Branch*, 466 U.S. 284, 290 (1984); see *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 56-58 (1974).<sup>12</sup> One reason given for that holding was that "arbitral factfinding is generally not equivalent to judicial factfinding," because "the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery [and] compulsory process . . . are often severely limited or unavailable." *McDonald*, 466 U.S. at 291 (quoting *Gardner-Denver*, 415 U.S. at 57-58).

Although *Gilmer* found these concerns "undermined" where there is an agreement to arbitrate statutory claims, *Gilmer* distinguished *McDonald* and *Gardner-Denver* because "those cases did not involve the enforceability of an agreement to arbitrate statutory claims." 500 U.S. at 33-35 & n.5. By so distinguishing the *Gardner-Denver* line of cases, *Gilmer* indicated those cases' continuing applicability where, as here, there is no agreement to arbitrate statutory claims. See, e.g., *Brisentine v. Stone & Webster Eng'g Corp.*, 117 F.3d 519, 523-27 (11th Cir. 1997); see also *Livadas v. Bradshaw*, 512 U.S. 107, 126 n.21 (1994) ("*Gilmer* emphasized its basic consistency with our unanimous decision in *Alexander*").<sup>13</sup>

*Gardner-Denver* and *McDonald* also found arbitration inadequate to protect federal statutory and constitutional rights because "an arbitrator's expertise 'pertains primarily to the law of the shop, not the law of the land.'" *McDonald*, 466 U.S. at 290 (quoting *Gardner-Denver*, 415 U.S. at 57). That factor also exists here and shows that decisions of "arbitrators" under

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<sup>12</sup> Both cases also recognized that, despite the availability of arbitration, employees could "elect to bypass arbitration and institute a lawsuit." *Gardner-Denver*, 415 U.S. at 59; accord *McDonald*, 466 U.S. at 292 n.11.

<sup>13</sup> *Gilmer* also is distinguishable from this case, because the arbitration procedures there did "allow for document production, information requests, depositions, and subpoenas." 500 U.S. at 31.

ALPA's scheme are unlikely to assist the courts in deciding the statutory and First-Amendment questions presented in agency-fee cases. See *Bromley*, 82 F.3d at 693.

Besides his decision, the only record evidence here as to the expertise of "arbitrator" Aronin is that the AAA appoints "an arbitrator from a special panel of arbitrators experienced in employment relations." (J.A. at 88, ¶ 3.) However, labor arbitrators "may not . . . have the expertise required to resolve the complex legal questions that arise in § 1983 actions." *McDonald*, 466 U.S. at 290.

A labor arbitrator's lack of necessary expertise is particularly likely in considering "difficult line-drawing questions," *Abood*, 431 U.S. at 236, whether union activities may be charged to nonmembers, including whether they "significantly add to the burdening of free speech that is inherent in the allowance of an agency . . . shop," *Lehnert*, 500 U.S. at 519. As Henry P. Monaghan, *First Amendment "Due Process"*, 83 Harv. L. Rev. 518, 523 (1970) (cited approvingly in *Hudson*, 475 U.S. at 303 n.12), said about a labor board, a labor arbitrator "when dealing with questions of speech, is more likely to see the problem in terms of labor-management relations than in terms of first amendment interests." Cf. *Breining*, 493 U.S. at 74 (doubting any special NLRB expertise in unfair-representation cases).

Insensitivity to First-Amendment interests is evident here from Aronin's decision. Aronin upheld ALPA's treatment of lobbying concerning federal air safety regulations as chargeable, (Pet. App. at 108a), despite the fact that, as the court of appeals said, "it is hard to imagine [nonmembers' First Amendment-type] interests more clearly placed in jeopardy than when the union uses the dissidents' money to pursue political objectives" such as air-safety regulations. (*Id.* at 14a.)

Thus, as in *McCarthy*, that the nonjudicial decisionmaker here "does not bring to bear any special expertise on the type of issue presented" militates against requiring exhaustion. See 503

U.S. at 155. At the least, as in *Patsy*, exhaustion should not be judicially imposed, because "there is debate over whether the specialization of federal courts in constitutional law is more important than the specialization of administrative agencies in their areas of expertise." 457 U.S. at 513 n.15.

#### E. Exhaustion Will Unduly Prejudice Nonmembers.

Finally, ALPA contends that the pilots' interests will not be unduly prejudiced by an exhaustion requirement, because the "time required to complete an agency-fee arbitration is generally not great," "the challengers are protected . . . by the escrow requirement imposed by *Hudson*," and the "remedial authority of the arbitrator is as broad as a court's." (ALPA's Br. at 23.) These contentions are all disingenuous.

- **Time:** "[U]ndue prejudice to subsequent assertion of a court action" "may result . . . from an unreasonable or indefinite timeframe for administrative action." *McCarthy*, 503 U.S. at 146-47. A party cannot be required to exhaust procedures that do not place a reasonable time limit on the consideration of claims. See *Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561, 587 (1989).

Here, the time frame is indefinite, because neither ALPA's procedure nor the AAA's rules contains deadlines for the initiation of "arbitration" by ALPA and the completion of hearings. (See J.A. at 69-70, 88-94.) In this case, the pilots sent their objections to ALPA in August 1993. The final "arbitration" decision was not issued until September 30, 1994, more than a year later. (Compare J.A. at 71-78 with Pet. App. at 158a-61a.)

Such a lengthy period not only unreasonably delays judicial resolution of these cases, but might even more seriously prejudice the pilots. The limitations period for unfair representation actions is six months. *DelCostello v. Teamsters*, 462 U.S. 151 (1983); *Lancaster v. ALPA*, 76 F.3d 1509, 1527 (10th Cir. 1996). Thus, "[u]nless the doctrine that statutes of limitations are

not tolled pending exhaustion" is inapplicable in these cases, as the Tenth Circuit held in *Lancaster*'s specific circumstances, 76 F.3d at 1528, a judicially imposed exhaustion requirement might effectively prevent nonmembers from ever receiving judicial consideration of their claims. See *Patsy*, 457 U.S. at 514 n.17.

Moreover, ALPA's procedure requires objecting pilots to request "arbitration" within thirty days of the SGNE's mailing, plus "a reasonable additional time for receipt." (J.A. at 69, 79.) Thus, were exhaustion required, ALPA's scheme would further prejudice the pilots by drastically truncating the limitations period from six months to about thirty days.<sup>14</sup> That a nonjudicial procedure imposes a short filing deadline "that create[s] a high risk of forfeiture of a claim for failure to comply" "counsel[s] strongly against exhaustion as a prerequisite to the filing of a federal-court action." *McCarthy*, 503 U.S. at 152-53; cf. *DelCostello*, 462 U.S. at 165-66 (a ninety-day arbitration limitations period is too short for unfair representation claims).

- **Escrow:** ALPA's scheme does not *completely* "avoid the risk that dissenters' funds may be used temporarily for an improper purpose," *Hudson*, 475 U.S. at 305. ALPA does not escrow challengers' *entire* agency fees. During a given calendar year, it escrows only "an amount equal to 1.5 times [its] estimate of its total agency fee rebate obligation for that year." (J.A. at 67-68.) When a pilot challenges ALPA's calculation of the reduced fee, it escrows "pending the outcome of the arbitration" only "the portion of the pilot's agency fee that ALPA determines to be reasonably in dispute." (*Id.* at 69.) Thus, ALPA has the use of part of challengers' agency fees at all times, and it is possible that some part may be spent for lawfully nonchargeable purposes. "The amount at stake for each individual dissenter does not diminish this concern." *Hudson*, 475 U.S. at 305.

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<sup>14</sup> Most unions have similarly short filing deadlines in their agency-fee objection procedures. See, e.g., *Nielsen v. Machinists Local 2569*, 94 F.3d 1107, 1116-17 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 1426 (1997).

Moreover, even if all portions of the fees for a particular year ultimately found to be nonchargeable by the "arbitrator" happen to have been escrowed, challengers have been deprived for a substantial time of the use for their own purposes of that portion of their monies.<sup>15</sup> That is not merely a deprivation of property, however. As Justice Brennan said in *Elrod v. Burns*, a likely consequence of the deprivation is that "the individual's ability to act according to his beliefs and to associate with others of his political persuasion is constrained." 427 U.S. 347, 355-56 (1976) (plurality opinion); accord *Branti v. Finkel*, 445 U.S. 507, 513 n.8 (1980); see *Seay v. McDonnell Douglas Corp.*, 427 F.2d 996, 1004 (9th Cir. 1970).

- **Remedial Authority.** An "administrative remedy may be inadequate 'because of some doubt as to whether the agency was empowered to grant effective relief.'" One such circumstance is where the agency may "lack authority to grant the relief requested." *McCarthy*, 503 U.S. at 147-48 (quoting *Gibson v. Berryhill*, 411 U.S. 564, 575 n.14 (1973)); see also *Clayton*, 451 U.S. at 693 ("where an aggrieved employee cannot obtain . . . the substantive relief he seeks," exhaustion "would delay judicial consideration . . . , but would not eliminate it").

Contrary to ALPA's assertion, there is serious doubt that the remedial authority of its "arbitrator is as broad as a court's," (ALPA's Br. at 23.) The RLA "contemplates resort to the usual judicial remedies of *injunction* and award of damages when appropriate for breach of th[e] duty" of fair representation. *Steele*, 323 U.S. at 207 (emphasis added). Thus, if a court finds that a union charged for an activity that is lawfully noncharge-

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<sup>15</sup> In this case, collection began in January 1992, but it was not until September 30, 1994, that the "arbitrator" found that 1.5% of the 1992 dues amount had been unlawfully collected from the pilots. (Pet. App. at 161a.) That, of course, was in addition to the amounts that ALPA earlier conceded it had collected unlawfully: 11% of dues in the first six months of 1992 and 2% in the last six months. (See *id.* at 2a.)

able, it can not only award damages, but also can enjoin the union from charging objecting nonmembers for that activity in the future. The pilots requested that relief here. (J.A. at 48.)

However, ALPA's "arbitrator" cannot provide prospective relief, because his authority derives from ALPA's policy. It authorizes him only to require restitution of the part of the fees for the particular year before him that he finds was collected unlawfully. (See J.A. at 69-70; Pet. App. at 114a-15a); cf. *Brosterhous v. State Bar*, 906 P.2d 1242, 1253 (Cal. 1995) (the arbitrator under a Bar's objection procedure "could not grant declaratory relief or enjoin future violations . . . or make any ruling that would bind the State Bar in the future").

In sum, policy considerations do not justify an exhaustion requirement here, and such a requirement would unduly prejudice nonmembers in all respects that ALPA says it would not.

**IV. Because the Impartial Decisionmaker Procedure Is a Review Procedure, Requiring Its Use Is an Exhaustion Requirement. Moreover, It Is One That Would Unlawfully Infringe Nonmembers' Right Not to Associate.**

Presumably because they find little support for their position in *Hudson* and exhaustion cases, the NEA, explicitly, and ALPA and the AFL-CIO, implicitly, argue that they are not attempting to impose an exhaustion requirement at all. Rather, they say, "a nonmember may not bypass a union's agency fee arbitration process and then mount a First Amendment challenge to the fee," because under *Hudson* "no First Amendment injury accrues unless and until the arbitrator frees the union to spend money over the nonmember's objection." (NEA's Br. at 18-19; see ALPA's Br. at 19 n.9; AFL-CIO's Br. at 13-14.)

*Williamson County Regional Planning Commission v. Hamilton Bank*, a case the NEA cites for this inventive argument, shows that ALPA and its *amici* confuse two "conceptually distinct" questions: "whether administrative remedies must be

exhausted" and "whether an administrative action must be final before it is judicially reviewable," 473 U.S. 172, 192 (1985).

[T]he finality requirement is concerned with whether *the initial decisionmaker* has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek *review of an adverse decision and obtain a remedy* if the decision is found to be unlawful or otherwise inappropriate.

*Id.* at 193 (emphasis added).

Here, ALPA is the "initial decisionmaker" and "arrive[s] at a definitive position" on the chargeability issue. When ALPA distributes its SGNE, it has finally determined what percentage of dues it will seize from nonmembers who object to paying for nonbargaining activities and will spend, despite those objections, if they do not seek review of its determination. The "impartial decisionmaker" does not participate in that decision. And, that decision "inflicts an actual, concrete injury." Dues are collected from the nonmembers based on ALPA's determination, upon pain of discharge for nonpayment, thus depriving the pilots of possession of part of their wages.

On the other hand, *Hudson* describes the "impartial decisionmaker" procedure as a "review procedure" and a "remedy." 475 U.S. at 307-08 & nn.19-21. And so it is in practice. The "arbitrator" determines whether ALPA validly calculated the agency fee charged objectors and orders a remedy: restitution of any portion of the fee that he finds was not lawfully collected. (See J.A. at 69-70; Pet. App. at 114a-15a.)

Therefore, *Williamson County* confirms that the court of appeals correctly held that exhaustion of ALPA's "arbitration" procedure is not required. The claim in that case was not ripe, because the property owner had not asked the Planning Commis-

sion to grant a variance and, thus, the Commission had not yet made "a conclusive determination . . . whether it would allow [the property owner] to develop the subdivision in the manner [the owner] proposed." 473 U.S. at 193. In short, in contrast to this case, there was no taking yet.

However, in *Williamson County*, there were two other procedures, similar to the "impartial decisionmaker" procedure here, that the Court held need *not* be used before the claim was ripe for judicial determination. The "State provide[d] procedures by which an aggrieved property owner may seek a declaratory judgment regarding the validity of zoning and planning actions taken by county authorities." The Court held that the property owner "would not be required to resort to those procedures before bringing its § 1983 action, because those procedures clearly are remedial." It also held that the owner "would not be required to appeal the [Planning] Commission's rejection of [a] preliminary plat to the Board of Zoning Appeals, because the Board was empowered, at most, to review that rejection, not to participate in the Commission's decisionmaking." *Id.*<sup>16</sup>

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<sup>16</sup> The other cases the NEA cites are wholly inapposite. *Cox v. New Hampshire*, 312 U.S. 569 (1941), and *Poulos v. New Hampshire*, 345 U.S. 395 (1953), held merely that government can require the obtaining of a license for the use of public property if the licensing agency makes only ministerial time, place, and manner determinations. See *Poulos*, 345 U.S. at 402-05; *Cox*, 312 U.S. at 575-76. The public *owns* the public streets and parks and, as proprietor, may make reasonable regulations for their use. ALPA has no authority as against nonmembers that justifies requiring them to seek a license from it through its "arbitration" scheme as a precondition to asserting in court their constitutional and statutory right to get back their own money. Moreover, *Poulos* recognized that government cannot require the obtaining of a license as a precondition to exercising First-Amendment rights where the licensing agency—like the "arbitrator" here—has discretion to make content-based determinations. See 345 U.S. at 403 n.9, 412-14. (continued...)

Moreover, the unions' "ripeness" argument misrepresents *Hudson*. A First-Amendment violation, or breach of the duty of fair representation, occurs when a union spends objecting nonmembers' agency fees on nonbargaining activities. However, such a violation, and a violation of the right not to be deprived of property without due process, *also* occurs when a union *collects* agency fees without having in place a procedure that satisfies the Constitution, or the duty of fair representation, in all respects, even if the union escrows all contested fees.<sup>17</sup> See, e.g., *Weaver v. University of Cincinnati*, 942 F.2d 1039, 1045-46 (6th Cir. 1991).

*Hudson* prescribed "constitutional requirements for the Union's *collection* of agency fees." 475 U.S. at 310 (emphasis added). These requirements were not imposed merely to prevent improper spending, as the unions argue. They also were imposed to "provide the protections necessary for any *deprivation of property*" and "to minimize both the impingement [of the agency shop itself on nonmembers' First-Amendment interests] and the burden" of objection. *Id.* at 304 n.13, 309 (emphasis added).

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<sup>16</sup> (...continued)

*Times Film Corp. v. City of Chicago* held only that a permit may be required to protect the public "against the dangers of obscenity in the public exhibition of motion pictures," because "'obscenity is not within the area of constitutionally protected speech,'" and motion pictures are "not 'necessarily subject to the precise rules governing any other particular method of expression.'" 365 U.S. 43, 49-50 (1961) (quoting *Roth v. United States*, 354 U.S. 476, 485 (1957), and *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)). Here, in contrast, the collection of agency fees even for bargaining purposes indisputably infringes on First-Amendment interests. See *Hudson*, 475 U.S. at 301 n.8, 307 & n.20; *Ellis*, 466 U.S. at 455; *Abood*, 431 U.S. at 222 (opinion of the Court), 255 (Powell, J., concurring). Nor does this case concern motion pictures.

<sup>17</sup> This Court recognized the procedural due process component of the duty of fair representation in *Steele*, 323 U.S. at 204.

The Court explicitly rejected the argument, now made here by ALPA and its *amici*, "that because a 100% escrow completely avoids the risk that dissenters' contributions could be used improperly," there is no constitutional violation. The Court held that the *Hudson* "plaintiffs established a constitutional violation," because the union's procedure "remains flawed in two [other] respects": the lack of "an adequate explanation for the advance reduction of dues" and "a reasonably prompt decision by an impartial decisionmaker." *Id.* at 309 & n.22.

*Hudson* also reiterated the Court's earlier holding in the RLA cases and *Abood* that the "nonmember's 'burden' is *simply* the obligation to make his objection known." *Id.* at 306 n.16 (emphasis added). Those earlier cases also held that an objection may be made for the first time "in [a] complaint filed in [a civil] action." *Railway Clerks v. Allen*, 373 U.S. 113, 119 n.6 (1963); accord *Abood*, 431 U.S. at 239 & n.39. And, *Hudson* emphasized that the union has "a responsibility to provide procedures that *minimize* th[e] impingement [of the agency shop on First-Amendment rights] and that *facilitate* a nonunion employee's ability to protect his rights." *Id.* at 307 n.20 (emphasis added).

It necessarily follows that a union's procedure is invalid—and a claim that the union has unlawfully collected agency fees is ripe for judicial determination—where the union's procedure fails to include one of the three required *Hudson* procedural safeguards (*i.e.*, notice, independent decisionmaker, and escrow) *or* includes some other element that imposes an impermissible condition on nonmembers' exercise of their right to challenge its calculation of lawfully chargeable expenses.

For example, under the NLRA and RLA, "the only aspect of union membership that can be required pursuant to a union shop agreement is the payment of dues." *Pattern Makers' League v. NLRB*, 473 U.S. 95, 106 n.16 (1985); see *Beck*, 487 U.S. at 744-45; *Railway Employees' Dep't v. Hanson*, 351 U.S. 225, 235-38 (1956). Thus, clearly, a union could not lawfully condition exercise of the right not to subsidize its nonbargaining

activities, or the right to challenge its calculation of bargaining costs, upon full membership.

Here, ALPA is attempting to condition exercise of both rights on compliance with an aspect of full union membership, use of a union-created remedy, see, e.g., *Neal v. System Bd. of Adjustment*, 348 F.2d 722, 726 (8th Cir. 1965). ALPA has demonstrated no consensual or federal statutory source of authority for that requirement.

Thus, by attempting to include that condition in its procedure, ALPA has invalidated the procedure and infringed on the pilots' statutory and First-Amendment rights by collecting agency fees from them, regardless of whether the procedure otherwise complies with *Hudson*, including its escrow requirement. As the court of appeals held in *Abrams v. Communications Workers*, a union's agency-fee procedure "requiring an objector who challenges the allocation of chargeable and non-chargeable expenses to exhaust Union-provided arbitration violates its duty of fair representation by limiting the choice of forum for the challenge." 59 F.3d 1373, 1382 (D.C. Cir. 1995); see also *Bromley*, 82 F.3d at 694 ("it is [not] constitutional for an agency shop agreement to require objecting employees to exhaust their arbitration remedies before going into court on their constitutional claims"); *Hohe v. Casey*, 956 F.2d 399, 408-09 (3d Cir. 1992) (a state requirement of exhaustion of public-sector union agency-fee procedures "is constitutionally unenforceable").

## CONCLUSION

The court of appeals correctly held that a nonmember "who wishes to bring an action in federal court [to challenge the lawfulness of the amount of an agency fee] is not obliged to proceed first to arbitration, at the union's option." There is "no legal basis for forcing into arbitration a party who never agreed to put his dispute over federal law to such a process," (Pet. App.

at 11a), either in *Hudson* or under the doctrine of exhaustion. The court of appeals' decision should be affirmed.

Respectfully submitted,

RAYMOND J. LAJEUNESSE, JR.  
*Counsel of Record*  
National Right to Work Legal  
Defense Foundation, Inc.  
8001 Braddock Road, Suite 600  
Springfield, VA 22160  
(703) 321-8510

PHILIP F. HUDOCK  
P.O. Box 3796  
Reston, VA 20195  
(703) 757-9577

ATTORNEYS FOR RESPONDENTS

February 6, 1998

## APPENDIX

### **United States Constitution, Article III**

**Section 1.** The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . .

**Section 2.** The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution [and] the Laws of the United States. . . .

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### **Railway Labor Act, §§ 2, Fourth and Fifth, 45 U.S.C. §§ 152, Fourth and Fifth (1988)**

#### **§ 152. General Duties**

\* \* \* \* \*

**Fourth. Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden . . .**

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for purposes of this chapter. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join

or remain or not to join or remain members of any labor organization. . . .

**Fifth. Agreements to join or not to join labor organizations forbidden**

No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization. . . .

MAR 5 1998

CLERK

No. 97-428

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1997

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AIR LINE PILOTS ASSOCIATION,  
*Petitioner,*  
v.

ROBERT A. MILLER, *et al.*,  
*Respondents.*

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On Writ of Certiorari to the  
United States Court of Appeals  
for the District of Columbia Circuit

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**PETITIONER'S REPLY BRIEF**

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JERRY D. ANKER  
*(Counsel of Record)*  
CLAY WARNER  
Air Line Pilots Association  
Legal Department  
1625 Massachusetts Avenue, N.W.  
Washington, D.C. 20036  
(202) 797-4087

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1997

\_\_\_\_\_  
 No. 97-428  
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AIR LINE PILOTS ASSOCIATION,  
 \_\_\_\_\_  
 v. *Petitioner,*

ROBERT A. MILLER, *et al.*,  
 \_\_\_\_\_  
*Respondents.*

On Writ of Certiorari to the  
 United States Court of Appeals  
 for the District of Columbia Circuit

\_\_\_\_\_  
**PETITIONER'S REPLY BRIEF**  
 \_\_\_\_\_

**I. ARBITRATION BEFORE AN IMPARTIAL DECISIONMAKER IS A FAIR AND EFFICIENT METHOD OF RESOLVING AGENCY-FEE DISPUTES.**

Throughout respondents' brief, aspersions are cast on the fairness and effectiveness of arbitration as a means of resolving agency-fee disputes. We address this subject first, because we realize the Court would be reluctant to require exhaustion of procedures it regarded as inherently unfair or ineffective. As we shall demonstrate, however, arbitration is not only a fair means of resolving agency-fee disputes, it is probably the only procedure that offers the kind of flexibility that such disputes require.

Respondents contend that the time allowed for requesting arbitration under ALPA's rules is inadequate (*see* Resp. Br. 40), and they criticize the American Arbitration Association (AAA) Rules for not giving challengers a role in the selection of the arbitrator or a right to "peremptorily disqualify" the arbitrator selected by the AAA (*id.* at 5, 31-32), for not incorporating judicial rules of evidence, and for not providing for prehearing discovery and identification of witnesses (*id.* at 5, 37). There is no merit to any of these criticisms.

In compliance with *Hudson's* requirement of a "prompt" dispute resolution procedure, 475 U.S. 292, 310 (1986), ALPA gives pilots 30 days from receipt of ALPA's "Statement of Germane and Nongermane Expenses" (SGNE) to request arbitration. Along with the SGNE, the pilots receive a copy of ALPA's written "Policies and Procedures Applicable to Agency Fees," which informs them of the 30-day requirement. (J.A. 69). If the pilot is dissatisfied with the SGNE, there is no reason why he would need more than 30 days to submit his arbitration request. A similar 30-day requirement existed in the procedure that the Court reviewed in *Hudson* itself, 475 U.S. at 296, and the Court found no fault with that requirement. *See also Andrews v. Educational Ass'n of Cheshire*, 653 F. Supp. 1373, 1378 (D. Conn.), *aff'd*, 829 F.2d 335 (2d Cir. 1987) ("The interest in a prompt resolution of such disputes is clear. The thirty-day period for objections is surely reasonable, and, indeed, ample.").

Under the AAA rules, the arbitrator is selected by the AAA itself "from a special panel of arbitrators experienced in employment relations." (Rule 3, J.A. 88). The rules ensure impartiality by requiring the arbitrator to "disclose any circumstance likely to create a presumption of bias" and permit parties to "challenge an arbitrator for cause." (Rule 4, J.A. 89). The AAA selection procedure has been reviewed for fairness and approved by five

circuits.<sup>1</sup> Respondents offer no basis for questioning the integrity of this selection process or the trustworthiness of the arbitrators chosen by it.

The other procedural features criticized by respondents are common to arbitration generally (including, for example, grievance arbitration under collective bargaining agreements) and have never been deemed to be unfair. Judicial rules of evidence are not rigidly applied in arbitration, but there clearly are constraints on the type of evidence that can be presented. The AAA rules direct the arbitrator to "be the judge of the relevance and materiality of the evidence offered." (Rule 14, J.A. 90). Similarly, while there are no provisions for discovery *per se*, the AAA rules empower the arbitrator to require production of "such additional evidence as the arbitrator may deem necessary to an understanding and determination of the dispute." (*Id.*)<sup>2</sup>

It is important to bear in mind that the arbitration rules applicable in this case were promulgated by the AAA for the express purpose of providing an "expeditious, fair, and objective" procedure (J.A. 85, quoting *Hudson*, 475 U.S. at 307) for resolving agency-fee disputes by means of an impartial decisionmaker. (J.A. 85).

<sup>1</sup> *See* cases cited in our opening brief at p. 23 n.11.

<sup>2</sup> Respondents assert that the arbitrator in this case "denied the pilots any discovery" under Rule 14. (Resp. Br. 34). That is not true. Respondents never requested the production of any evidence or information pursuant to that rule. That is not surprising, since respondents, having filed their lawsuit in December 1991, had obtained discovery in that lawsuit for two years before the date of the arbitration hearing. Respondents' brief implies that ALPA resisted all discovery in the district court, but that is also not true. ALPA produced approximately 7,400 pages of documents in response to 6 separate document requests, answered 56 interrogatories, and produced 5 witnesses for deposition, including its Director of Finance. (*See* R. 89, Ex. 1). In addition, ALPA's independent auditors, Price Waterhouse, produced two witnesses for deposition and 400 pages of documents relating to its audits. (*Id.*) Respondents had most of these discovery materials at the time of the arbitration. (*See* R. 69, p. 2).

The AAA is the leading arbitration organization in the United States, and litigants have long relied on its rules, procedures, and arbitrators for arbitration of all manner of disputes, often involving extremely high stakes. The suggestion that the rules the AAA developed for the specific purpose of resolving agency-fee disputes are somehow biased or procedurally unfair is implausible on its face.

Not only is arbitration under the AAA rules procedurally fair to all parties, but it is particularly well-suited for the efficient resolution of agency-fee disputes. To demonstrate this, it is necessary to look more closely at how such disputes are presented in arbitration.

This Court has held that agency-fee objectors need not specify the particular union expenditures or activities that they regard as outside the realm of collective bargaining; rather, they can simply assert their opposition to all "ideological expenditures of any sort that are unrelated to collective bargaining." *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209, 241 (1977). This means that, when an objector challenges a union's fee calculation, the union has no way of knowing which of its thousands of expenditures are being contested. Nevertheless, the union has the burden of proving that its expenditures have been properly categorized as chargeable or nonchargeable.

It is obviously impractical for a union to meet this burden by presenting detailed evidence concerning every individual item of expense. The most a union can do is what ALPA did at the arbitration in this case—provide evidence describing its overall operations, governance, and management; the nature and operation of its accounting system and how it tracks costs by functional "project"; the methods and criteria it uses to allocate its costs based on whether they are germane or not germane to collective bargaining; and the results of those allocations for the year in question.<sup>3</sup>

<sup>3</sup> Respondents characterize the evidence ALPA presented as "self-serving, general explanations of ALPA's activities, bookkeeping

Once the proceeding is underway, however, specific issues will inevitably emerge. The objectors, through cross-examination and/or presentation of their own evidence and arguments, will tend to focus on the chargeability of particular union activities and categories of expenditures. At that point, the flexibility of arbitration becomes particularly useful. It allows the proceedings to be recessed, if necessary, to permit the gathering of additional evidence needed to respond to issues that are raised for the first time in the course of the hearing. If the arbitrator believes additional evidence is required to clarify certain points, he can request that it be produced.

For example, at the arbitration hearing in this case, respondents' cross-examination of ALPA's Director of Finance focused a great deal of attention on certain overhead expenses, suggesting that ALPA had not properly allocated them as germane and nongermane. (R. 99, Arb. Tr. 369-84, 466-70). During one of the recesses in the proceeding, ALPA was able to prepare additional testimony and highly detailed accounting exhibits showing how four major categories of overhead expense were distributed among scores of individual "project" accounts. (*Id.* at 542-62 and ALPA Arb. Exhs. 13A-D). Similarly, on the second day of the hearing the arbitrator himself questioned the germaneness to collective bargaining of ALPA's activities related to air safety (Arb. Tr. 271-72), and ended up telling ALPA "you should plan having

system, and preparation of the SGNE" (Resp. Br. 5), and complain that ALPA's accounting exhibits were "summaries or blank forms." (*Id.* at 5-6). In fact, ALPA's witnesses presented factual testimony, under oath, based on personal knowledge. The "blank forms" respondents refer to (R. 99, Arb. Exhs. 8, 9) were actual accounting forms used by ALPA to record and track expenses, and were offered as part of its explanation of how the accounting system works. The "summaries" respondents refer to consisted of actual accounting data compiled from ALPA's computer accounting system. (*Id.*, Arb. Exhs. 12, 13). They are "summaries" only in the sense that all accounting reports are summaries of the underlying financial transactions.

someone here who can give us additional information in terms of [the safety activities'] relevance to negotiations or to the performance of representational functions." (*Id.* at 281). In response, ALPA called an additional witness on the third day of the arbitration hearing to address that specific issue. (*Id.* at 614-733). This was possible only because there was a one-month recess between the second and third day of the hearing, something that would probably not have occurred in a court proceeding.

This kind of flexibility is important because there is no way a union can predict, prior to the commencement of a hearing, all the issues that will be raised and all the evidence that may become relevant. As a theoretical matter, every document relating to every expense incurred in the course of a year could become relevant. Similarly, every union official or employee has knowledge that may be relevant to the issue of whether particular activities or expenses are germane to collective bargaining. Without advance knowledge of the specific issues that will be the focus of the proceeding, a union has little ability to predict just which documents and witnesses it should prepare to introduce. It is obviously impossible to produce every such document or every such witness—and even if it were possible to do so, no court or arbitrator would have the time and energy to hear, examine, or assimilate that volume of evidence.<sup>4</sup>

It is difficult to conceive how a court could fairly try an agency-fee dispute *ab initio*, given that the plaintiffs

<sup>4</sup> The problem is illustrated by certain discovery disputes that arose between the parties in the district court. Respondents served some document requests on ALPA that would effectively have required production of all documents relating to all expenses incurred by ALPA for various years, including 1992. ALPA objected to these requests as unreasonably burdensome. (*See* R. 40, Exh. 1; R. 89, Exh. 1). The documents for the year 1992 alone filled approximately 100 file boxes stored in a warehouse, and it may be presumed that the records for the other years were equally voluminous.

who challenge an agency-fee calculation are not required to state any grounds whatsoever for their challenge. On the other hand, if the challengers are required to exhaust an arbitration process before seeking judicial relief, the case will come to the court with a defined set of issues and an evidentiary record. Regardless of what standard of review would then be applicable, the court would be in a far better position to resolve the dispute expeditiously than it would be if there had been no arbitration.

## II. RESPONDENTS' ATTACK ON ARBITRATION AS A MEANS OF RESOLVING AGENCY-FEE DISPUTES CONFLICTS WITH THIS COURT'S DECISION IN *HUDSON*.

Respondents discuss the arbitration procedure in this case as if it were nothing more than an ALPA plot to thwart the rights of agency-fee objectors. In fact, ALPA adopted that procedure not for its own benefit, but to comply with the *Hudson* requirement that there be an "impartial decisionmaker" to hear and decide agency-fee challenges. Respondents' attack on that procedure is, in effect, an attack on *Hudson* itself.

It is clear that *Hudson* contemplates some form of arbitration. Indeed, one of the issues in *Hudson* was whether the arbitration procedure that the union in that case had already established was satisfactory, and the only fault the Court found with that procedure was that it allowed the union itself to select the arbitrator. *See* 475 U.S. at 308. The Court seemed satisfied that if that defect was corrected, the arbitration mechanism would provide the "expeditious, fair, and objective" procedure that was required. 475 U.S. at 307. There was no suggestion that the arbitration must also provide for discovery, or follow judicial rules of evidence. The Court expressly disagreed with the Seventh Circuit's view "that a full-dress administrative hearing, with evidentiary safeguards, is part of the 'constitutional minimum.'" 475 U.S. at 308 n.21.

Thus, respondents' attack on the fairness and adequacy of arbitration as a means of resolving agency-fee disputes is fundamentally at odds with the *Hudson* decision. And, as we have previously argued, respondents' ultimate position on the issue of exhaustion is also inconsistent with the goals of *Hudson*. Little purpose would be served by an "impartial decisionmaker" procedure if, as respondents contend, objectors are free to disregard it and bring their dispute directly to court.

### III. THERE IS NO LEGAL BARRIER TO REQUIRING EXHAUSTION OF THE HUDSON IMPARTIAL-DECISIONMAKER PROCEDURE.

Respondents contend that exhaustion cannot be required because (a) no agreement between the parties requires exhaustion, (b) no statute requires exhaustion, and (c) an exhaustion requirement would violate Article III of the Constitution.

The first two of these arguments are inconsistent with decisions of this Court holding that exhaustion can be required as a matter of judicial discretion, even when not required by statute or agreement, so long as no statute prohibits such a requirement. See *Patsy v. Board of Regents of Florida*, 457 U.S. 496, 501 (1982) ("Of course, courts play an important role in determining the limits of an exhaustion requirement and may impose such a requirement even where Congress has not expressly so provided."). See also *id.* at 518 (White, J., concurring) ("exhaustion is 'a rule of judicial administration,' . . . and unless Congress directs otherwise, rightfully subject to crafting by judges"); *McGee v. United States*, 402 U.S. 479, 483 n.6 (1971) ("Nor is it tenable to say that the [exhaustion] doctrine is inappropriate when fashioned by judicial decision rather than specific congressional command."); *McCarthy v. Madigan*, 503 U.S. 140, 144, 152 (1992) ("where Congress has not clearly required exhaustion, sound judicial discretion governs"). Respondents

cannot point to anything in the text or legislative history of the Railway Labor Act that precludes an exhaustion requirement. The statute is entirely silent on the issue. The Court is thus free to decide it as a matter of judicial discretion.

Nor is there merit to respondents' argument that because a union's obligations to agency-fee objectors are part of its duty of fair representation, see *Communications Workers v. Beck*, 487 U.S. 735, 742-44 (1988), the courts are the proper forum in which to enforce those obligations. When this Court held in *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 204-07 (1944) that the duty of fair representation under the Railway Labor Act is enforceable by the courts, it was addressing a question of jurisdiction, not exhaustion. The question was whether a court or some other body, such as the Railroad Adjustment Board, had jurisdiction to enforce the duty of fair representation. Here the issue is quite different. *Hudson* held that part of a union's duty of fair representation with respect to agency fees is to provide an impartial-decisionmaker procedure for resolving agency-fee disputes. This ruling raises the issue whether an objector must exhaust that procedure before bringing the underlying fee dispute to court. No such issue can arise in other kinds of fair representation situations, where no similar dispute-resolution procedure exists. Thus, neither *Steele* nor its progeny can shed any light on the issue presented here.

Finally, there is no merit to respondents' argument that an exhaustion requirement would violate Article III, Section 1 of the Constitution, which vests "[t]he judicial Power of the United States" in the federal courts. If this argument had merit, *Hudson* itself could not stand, because that case forces unions (which have the same rights under Article III as respondents) to submit agency-fee disputes to adjudication before a nonjudicial decisionmaker. Article III is not implicated here, however, because the impartial-decisionmaker procedure mandated by *Hudson* is not a limitation on the jurisdiction of the fed-

eral courts, but rather a limitation on the underlying substantive rights of the parties to agency-fee disputes. As to the unions, *Hudson* effectively holds that their substantive right to enter into and enforce agency-shop agreements is subject to an obligation to provide an impartial-decisionmaker procedure to resolve certain classes of fee disputes. Similarly, the objectors' right to have their fees adjusted to exclude costs unrelated to collective bargaining should be subject to the condition that any dispute as to the fee adjustment must initially be submitted to the impartial decisionmaker. Such a condition would not be a restriction on the jurisdiction of the federal courts, but rather a limitation on the objectors' cause of action. It would simply mean that the objector has no cognizable claim for judicial relief until he or she has exhausted that procedure. Once such exhaustion has occurred, however, any objector dissatisfied with the outcome of that procedure could assert a claim in federal court.

#### IV. PRUDENTIAL CONSIDERATIONS STRONGLY FAVOR AN EXHAUSTION REQUIREMENT.

In our opening brief, we argued that the exhaustion issue presented in this case must be decided on the basis of sound judicial discretion, and we presented several reasons why exhaustion should be required. We now address respondents' criticisms of these arguments.

##### A. Relieving The Courts Of Having To Micromanage Agency Fees.

In response to ALPA's argument that an exhaustion requirement will relieve the courts of having to micromanage agency-fee calculations, respondents argue that fee disputes will ultimately end up in court in any event. Even if the scope of judicial review of the impartial decisionmaker's decision is limited in the way ALPA contended below it should be, they say, there will still be difficult issues for the courts to decide. (Resp. Br. 28). And, they point out, this Court did not grant certiorari

with respect to the scope of review question, so one can make no assumption as to how that issue will ultimately be resolved.<sup>6</sup>

To be sure, the extent to which the courts will be burdened by the minutiae of fee disputes will be affected by the scope of review. But even assuming a *de novo* standard of review, a court's task will be greatly simplified if there has been a prior arbitration proceeding. As noted above, the arbitration will at least serve to narrow and define the issues in dispute, so that by the time the case reaches the court the parties will know what they agree upon and what they do not. Furthermore, the existence of the arbitration record will reduce the need for discovery after a case comes to court, because much, if not all, of the relevant evidence will have already been produced in arbitration. At the very least, the knowledge the parties have gained through arbitration will enable them to focus their discovery requests much more precisely than would otherwise be the case. The arbitration record, plus any additional discovery materials, might also make it possible to decide the case on summary judgment, avoiding the need for any trial. Alternatively, the use of the arbitration record as evidence at trial would serve to reduce the amount of trial time required.

Nor should it be assumed that the outcome of the arbitration will always be challenged. The National Educa-

<sup>6</sup> Respondents incorrectly suggest that because of this Court's limited certiorari grant, the court of appeals' reversal of the district court's ruling with respect to the scope-of-review issue is now final. (Resp. Br. 8). That is not correct. The court of appeals' ruling on this issue was tied to its ruling on the exhaustion issue. It held that because exhaustion was not required, "the parties' dispute as to the scope of review of the arbitrator's decision is beside the point," because "the arbitrator's decision is no longer part of the legal picture." (Pet. App. 4a, 13a). Therefore, if this Court reverses the court of appeals on the issue of exhaustion, a remand would be needed for further consideration of the scope-of-review issue.

tion Association, in its *amicus* brief (p. 14), states that in its experience objectors are often satisfied with the outcome of the arbitration. Even in this case, a large number of pilots accepted the outcome of the arbitration and did not join in respondents' lawsuit.

#### B. Elimination Of Duplicative Litigation.

We argued in our opening brief that unless exhaustion of the arbitration procedure is required before a lawsuit can be brought, unions will be forced to defend their agency-fee calculations simultaneously in both judicial and arbitral proceedings. Respondents assert that this problem can be avoided without an exhaustion requirement if the union provides for "expeditious arbitration" and a "prompt decision" by the arbitrator. (Resp. Br. 29). Respondents are not suggesting that objectors would await the outcome of such an "expeditious arbitration" before filing suit. They are merely saying that the arbitration would "likely be concluded before the merits are at issue in a court action." (*Id.*) In other words, the judicial *trial* might not occur before the arbitration is completed, but all the pre-trial court proceedings—pleadings, motions, discovery—would nevertheless overlap with the arbitration. This is, of course, precisely the kind of dual-track litigation that an exhaustion requirement would prevent.

Next, respondents suggest that it is "highly unlikely" that any objectors would choose arbitration if the union "agreed to class treatment of judicial claims and willingly provided discovery." (Resp. Br. 29). Courts, however, have generally found class certification inappropriate in agency-fee cases, particularly where the named plaintiffs are represented, as respondents are here, by the National Right to Work Foundation. See *Gilpin v. American Fed'n of State, County, and Municipal Employees*, 875 F.2d 1310, 1313 (7th Cir.), *cert. denied*, 493 U.S. 917 (1989); *Kidwell v. Transportation Communications Int'l Union*, 946 F.2d 283, 304-06 (4th Cir. 1991), *cert. de-*

*nied*, 503 U.S. 1005 (1992); *Weaver v. University of Cincinnati*, 970 F.2d 1523, 1530-31 (6th Cir. 1992), *cert. denied*, 507 U.S. 917 (1993). As these cases noted, the individuals filing a lawsuit may be "hostile to unions on political or ideological grounds," and their aim may be "to weaken and if possible destroy the union," while other members of the putative class may be "happy to be represented by the union" and wish "merely to shift as much of the cost of representation as possible to other workers, i.e., union members." *Gilpin*, 875 F.2d at 1313. In the present case, respondents did not even appeal the district court's denial of class certification.

Nor is there reason to believe that all objectors would choose litigation over arbitration merely because of the availability of discovery. In this case, ALPA provided extensive discovery to respondents,<sup>6</sup> but many pilots nevertheless chose not to join the lawsuit and opted instead for arbitration.

Finally, respondents suggest that a union may dispense entirely with arbitration if it provides for "expedited judicial proceedings" to resolve agency-fee disputes. (Resp. Br. 17). They base this argument on the Court's statement in *Hudson* that "if a State chooses to provide extraordinarily swift judicial review for these [agency-fee] challenges, that review would satisfy the requirement of a reasonably prompt decision by an impartial decision-maker." 475 U.S. at 307 n.20 (emphasis added). Of course, ALPA is not "a State" but a private litigant, and as such has no way of controlling the swiftness of judicial litigation. In this case, for example, the proceedings in the district court took 4½ years, and would have taken even longer if the case had been tried rather than decided by summary judgment. Contrary to respondents' innu-

<sup>6</sup> Respondents' charge at page 29 of their brief that ALPA "oppos[ed]" all discovery in this case is false. ALPA complied with the vast majority of discovery requests made upon it. See footnote 2, page 3, *supra*.

endo, there were no "dilatatory litigation tactics" (Resp. Br. 30) on ALPA's part. If anything, it was respondents who prolonged the litigation.<sup>7</sup> In fairness, however, most of the delays in the case were beyond the control of any of the parties. The many criminal cases and other matters competing for the district court's attention simply prevented it from dealing promptly with issues in this case as they arose. Such delays are unavoidable in the courts. There is no way, other than arbitration, that a union can provide the kind of prompt decision by an impartial decisionmaker that *Hudson* requires.

**C. The Possibility That In Some Cases Arbitration Will Produce A Result Satisfactory To The Objectors.**

We argued below that if exhaustion is required, the arbitration would in some cases produce a result satisfactory to the objectors, thus obviating the need for any court litigation. Respondents disagree. First, they argue that because the substantive standards for determining chargeability are quite broad and vague, nonmembers are likely to continue to seek judicial resolution of chargeability issues. (Resp. Br. 30). This argument is a *non-sequitur*. A party can be satisfied with the result of a specific case even if the governing legal principles are unclear. Indeed, a rational litigant may decide to accept rather than to appeal a particular decision precisely because the law is uncertain. Such uncertainty, after all, increases the risk that the outcome of further litigation will be even less satisfactory than the result already obtained.

<sup>7</sup> Respondents delayed the case by moving to amend their complaint on October 8, 1992 (R. 37), more than two months after the parties had filed cross-motions for summary judgment; by moving to reopen discovery on February 19, 1993 (R. 55), 7-1/2 months after discovery had closed; and by bringing a large number of intervenors into the case by a motion filed on January 10, 1994 (R. 72).

Next, respondents argue that various procedural issues relating to the arbitration can generate court litigation. (*Id.* at 31). Again, the fact that such issues could be raised does not mean that objectors will always wish to raise them. If they find the arbitrator's decision on the merits satisfactory, they will have no reason to challenge it on procedural grounds.

Finally, respondents assert that objectors are unlikely to accept an arbitration decision when they have not participated in the selection of the arbitrator. (*Id.*) They make this assertion as if it were self-evident, but there is no reason why it should be so. We have already shown that the AAA selection procedure is fair. (*See* pp. 2-3, *supra*). The parties also do not have any voice in the selection of the judge assigned to their case in a court proceeding, yet no one would suggest that this fact, in itself, makes the judge's decision suspect. And, contrary to respondents' suggestion that courts are better equipped than arbitrators to resolve agency-fee disputes, the experience of most arbitrators will probably be more relevant to such disputes than that of federal judges. Because of their labor-relations background, arbitrators will likely be better equipped than judges to determine the core issue in such disputes—namely, which activities and expenditures are reasonably related to the union's performance of its collective bargaining responsibilities.

Admittedly, no one can predict with certainty how often the decisions of arbitrators will be acceptable to all parties. It is reasonable to assume, however, that if exhaustion is required in every case, *some* of the arbitration decisions will be.

**D. The Likelihood That Any Arbitration Proceeding And Decision Will At Least Simplify And Define The Issues For Judicial Determination.**

In response to ALPA's argument that an arbitration will at least simplify and define the issues to be litigated in any subsequent court action, respondents rely on their

various criticisms of the fairness and adequacy of the arbitration procedure, which we have already addressed above. (See pp. 1-4, *supra*). We would only add here that if, in any particular case, the arbitration proceeding does not afford objectors a fair hearing, or if the court finds that the nature and quality of the evidence presented at the hearing was not adequate to meet the union's burden of proof, then the court would have full authority to grant whatever relief is appropriate. No one is arguing in this case that the decision of an arbitrator in a *Hudson*-type proceeding would be final and binding on the parties. While the issue of what the precise standard of review will be is still to be resolved, there is no dispute that the court would have authority to review the arbitration for procedural fairness and proper application of the burden of proof. However, if there has been a fair arbitration proceeding—as we believe there was here—the record of that proceeding, and the decision of the arbitrator, will surely simplify the court's task in deciding the matter on the merits.

#### V. OBJECTORS SUFFER NO COGNIZABLE INJURY DURING THE PENDENCY OF THE ARBITRATION PROCESS.

Respondents argue that arbitration injures objectors because, during the pendency of that process, they are "deprived for a substantial time" of a portion of their wages that the union may ultimately be found not to be entitled to collect. (Resp. Br. 41). Collection of agency fees, however, does not violate any objector's rights, so long as there are procedures in place "which will avoid the risk that [objectors'] funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining." *Hudson*, 475 U.S. at 305 (quoting *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209, 244 (1977) (concurring opinion)). The only legitimate grievance objectors may have "stems from the *spending* of their funds for purposes not authorized by the Act in the face of their objection, not from the enforcement of the union-shop agreement by the mere collection of funds." *International*

*Ass'n of Machinists v. Street*, 367 U.S. 740, 771 (1961) (emphasis added). The objector's "interest [is] in not being *compelled to subsidize* the propagation of political or ideological views that they oppose . . . ." *Hudson*, 475 U.S. at 305 (emphasis added). The requirement of an escrow pending arbitration of the "amounts reasonably in dispute," 475 U.S. at 311, was intended to guard against any such expenditure while the arbitration was in process. So long as such an escrow is in place, objectors can suffer no legally cognizable injury during the pendency of the arbitration.

Respondents' argument that the amount of the escrow may ultimately turn out to be inadequate (Resp. Br. 40) is a quarrel with the holding of *Hudson* itself. The Court specifically determined in that case that a 100 percent escrow would not be required, because it would "depriv[e] the Union of access to some escrowed funds that it is unquestionably entitled to retain." 475 U.S. at 310. If in a particular case objectors believe that an escrowed amount is inadequate to cover their claims, they could complain to the arbitrator or a court. No such complaint was ever voiced in this case.

#### CONCLUSION

For the reasons stated above and in our opening brief, the judgment below should be reversed and the case remanded for further proceedings in accordance with this Court's ruling.

Respectfully submitted,

JERRY D. ANKER

(Counsel of Record)

CLAY WARNER

Air Line Pilots Association

Legal Department

1625 Massachusetts Avenue, N.W.

Washington, D.C. 20036

(202) 797-4087

Counsel for Petitioner

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OCTOBER TERM, 1997

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v.

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR  
AND CONGRESS OF INDUSTRIAL ORGANIZATIONS  
AS AMICUS CURIAE IN SUPPORT OF PETITIONER

JONATHAN P. HIATT  
JAMES B. COPPES  
815 16th Street, N.W.  
Washington, D.C. 20006

LAURENCE GOLD  
(Counsel of Record)  
1000 Connecticut Avenue, N.W.  
Washington, D.C. 20036  
(202) 833-9340



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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1997

\_\_\_\_\_  
No. 97-428  
\_\_\_\_\_

AIR LINE PILOTS ASSOCIATION,  
*Petitioner,*

v.

ROBERT A. MILLER, *et al.*,  
*Respondents.*

\_\_\_\_\_  
On Writ of Certiorari to the  
United States Court of Appeals  
for the District of Columbia Circuit  
\_\_\_\_\_

BRIEF FOR THE AMERICAN FEDERATION OF LABOR  
AND CONGRESS OF INDUSTRIAL ORGANIZATIONS  
AS AMICUS CURIAE IN SUPPORT OF PETITIONER

\_\_\_\_\_  
The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") a federation of 75 national and international unions with a total membership of approximately 13,000,000 working men and women, files this brief *amicus curiae* with the consent of the parties as provided for in the Rules of this Court.<sup>1</sup>

<sup>1</sup> No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus curiae*, made a monetary contribution to the preparation or submission of this brief.

## SUMMARY OF ARGUMENT

In a series of decisions, this Court first established a right of union-represented employees who are not members to prevent union expenditures of their contractually-required agency fees for purposes unrelated to collective bargaining over the employee's objection; and, then defined a procedure by which unions can vindicate this non-member right. This procedure, which is drawn from the substantive law governing agency shop relationships and crafted to further the purposes of that legal regime, has a two-fold office: preventing objecting fee payers from being compelled to subsidize noncollective bargaining activities; and, at the same time, allowing unions to fairly spread the costs of collective bargaining among all represented employees, including the objectors.

One aspect of the procedural requirements defined by this Court is the provision by the union of an expeditious process whereby the objecting fee payers can promptly challenge the union's calculation of his fee reduction before an impartial decisionmaker, while the amount reasonably in dispute is held in escrow. The question presented by this case is whether an objecting nonmember can bypass the impartial-decisionmaker/escrow stage of the procedure and challenge the union's calculation by filing suit in federal court. The court of appeals answered that question "yes;" it is our submission that the correct answer is "no."

The set of union objection procedure rules this Court has established can accomplish its purposes only by operating as a coherent whole. In contrast, allowing the procedure to be pretermitted at the objector's option, as does the court of appeals' decision, undermines those purposes.

By reason of the procedure's structure and design, no objector can be compelled to finance any nonchargeable union activities before the procedure has run its course. That being so, no objector can claim that he has been compelled to subsidize such activities before the terminal challenge phase of the procedure is concluded. As a re-

sult, permitting an objector to challenge the fee calculation in court before that point is to permit premature and unnecessary litigation. Allowing an objector to short-circuit the procedure and bring his challenge to court before the impartial decisionmaker has been allowed to consider and pass upon the fee dispute, moreover, encroaches upon the interest of the union in being able to promptly deploy agency fee receipts for collective bargaining purposes in a manner that spreads the costs of collective bargaining equally among all represented employees.

## ARGUMENT

*Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), "outlined a minimum set of procedures by which a union in an agency-shop relationship could meet its requirement[s]" with regard to agency fees paid by nonmembers who object to financing union activities that are not germane to collective bargaining. *Keller v. State Bar of California*, 496 U.S. 1, 17 (1990).

The court of appeals in this case treated one of these procedural requirements—the provision by the union of "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker," *Hudson*, 475 U.S. at 310—as a mere option for the sole benefit of objectors with a preference for prompt decisionmaking.

That, we submit, is to misunderstand *Hudson* and the office of the *Hudson* procedures. Those procedures are *not* drawn from some abstract notion of procedural due process (although the procedures do, of course, satisfy due process). Rather, *Hudson* sets out a carefully balanced set of rules drawn from the *substantive* law governing the agency-shop relationship whose office is to "prevent[] compulsory subsidization of ideological activity by employees who object thereto *without* restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." *Hudson*, 475 U.S. at 302 (emphasis added), quoting *Abood v. Detroit Board of Education*, 431 U.S. 209, 237 (1977).

The *Hudson* rules protect the objecting fee payers' interests by providing that the union is to: (i) promptly calculate the proportion of total union expenditures that support its collective bargaining function; (ii) reduce the objectors' fees accordingly; (iii) provide the objectors with an explanation of the basis for the union calculation of the reduced fee; (iv) provide the objectors the opportunity to challenge the fee reduction calculation before an impartial decisionmaker in an expeditious process; and (v) escrow the portion of the objectors' fees that is reasonably put in dispute by such a challenge.<sup>1</sup>

Equally to the point, the *Hudson* rules are framed in such a way as to minimize the interference with the union's ability to apply, with reasonable promptness, the objectors' agency fee payments to the support of the union's collective bargaining function.

This set of rules can accomplish its salutary purposes only by operating as a coherent and complete whole and can only fail of those purposes if the final "challenge" stage of the procedure can, as the court of appeals believed, be pretermitted at the objector's option.

<sup>1</sup> *Abrams v. Communications Workers*, 59 F.3d 1373, 1376 (D.C. Cir. 1995), details the operation of one union objection procedure conforming to the *Hudson* requirements. Under the procedure in that case, the union "informs nonmembers of their right to object by a notice distributed yearly to all employees." *Id.* Nonmembers may then file objections up to a cut-off date just before the union's "fee year" begins. *Id.* "At the beginning of the fee year an objector receives from the Union an 'advance reduction' payment equal to the amount attributable to nonchargeable expenditures that will be deducted from his paychecks during the coming year." *Id.* "The amount of the advance reduction payment is calculated by an outside accounting firm" based on the union's expenditures "during the preceding year." *Id.* "Along with the payment the Union provides a detailed accounting of its expenses and a description of the expenses it considers chargeable and nonchargeable." *Id.* "Any employee who challenges the amount of the advance reduction . . . is then referred to arbitration." *Id.*

In the argument that follows we retrace the decisional path that begins with *Machinists v. Street*, 367 U.S. 740 (1961), and place *Hudson* in its proper legal context, to show that the court of appeals' approach does not give full scope of the *Hudson* procedures or full credit to *Hudson's* underlying rationale.

1. Section 2, Eleventh of the Railway Labor Act (RLA) permits carriers and labor organizations covered by that Act "to make agreements, requiring as a condition of continued employment, that . . . all employees shall become members of the labor organization representing their craft or class" to the extent of "tender[ing] the periodic dues, initiation fees, and assessments . . . uniformly required as a condition of acquiring or retaining membership." 45 U.S.C. § 152, Eleventh (a).

In *Railway Employees' Dept. v. Hanson*, 351 U.S. 235 (1953), the Court, in a holding premised on the stated understanding that "[t]he financial support required relates . . . to the work of the union in the realm of collective bargaining," *id.* at 235, concluded that "the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work is within the power of congress under the Commerce Clause and does not violate either the First or the Fifth Amendments," *id.* at 238.

The Court was presented with the same kind of constitutional challenge in *Machinists v. Street*, *supra*, this time on a fuller record of the nature of the union's expenditures. And, *Street* avoided the constitutional issue reserved in *Hanson* by its holding "that § 2, Eleventh of the RLA does not permit a union, over the objections of nonmembers, to expend compelled agency fees on political causes." *Communications Workers v. Beck*, 487 U.S. 735, 745 (1988).

As the *Street* Court stressed—and as the Court has repeatedly stressed since—the objecting fee payers' "griev-

ance stems from the spending of their funds for purposes not authorized by the Act in the face of their objection, not from the enforcement of the union-shop agreement by the mere collection of funds." 367 U.S. at 771.<sup>2</sup>

At the same time, the Court has warned that "restraining collection of funds . . . might well interfere with the . . . unions' performance of those functions and duties which the Railway Labor Act places upon them to attain its goal of stability in the industry." *Street*, 367 U.S. at 771. Elaborating on this point, the Court explained:

The complete shutoff of this source of income defeats the congressional plan to have all employees benefited share costs "in the realm of collective bargaining." *Hanson*, 351 U.S. at p. 235, and threatens the basic congressional policy of the Railway Labor Act for self-adjustments between effective carrier organizations and effective labor organizations. [367 U.S. at 772.]

The Court, therefore, concluded that "an injunction restraining enforcement of the union-shop agreement is . . . plainly not a remedy appropriate to the violation of the Act's restriction on expenditures." 367 U.S. at 771.

<sup>2</sup> See *Railway Clerks v. Allen*, 373 U.S. 113, 120 (1963) (quoting this passage from *Street*); *Ellis v. Railway Clerks*, 466 U.S. 435, 434 ("In *Machinist v. Street*, 367 U.S. 740 (1961), the Court held that the Act does not authorize a union to spend an objecting employee's money to support political causes."); *Beck*, 487 U.S. at 738 (Section 8(a)(3) of the National Labor Relations Act does not "permit a union, over the objections of dues-paying nonmember employees, to expend funds so collected on activities unrelated to collective bargaining, contract administration, or grievance adjustment. . . .") & 745 ("§ 2, Eleventh of the RLA does not permit a union, over the objections of nonmembers, to expend compelled agency fees on political causes."). See also *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 515 (1991) ("[T]he *Street* Court construed the RLA to deny unions the authority to expend dissenters' funds in support of political causes to which those employees objected.").

*Accord Allen*, 373 U.S. at 122 ("no decree would be proper which appeared likely to infringe the unions' right to expend uniform exactions under the union-shop agreement in support of activities germane to collective bargaining").

The public sector union security cases that comprised the next wave of litigation came out in essentially the same place, albeit on a constitutional rather than a statutory basis. "In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), the Court confronted the issue whether, consistent with the First Amendment, agency-shop dues of nonunion public employees could be used to support political and ideological causes of the union which were unrelated to collective-bargaining activities." *Keller*, 496 U.S. at 9. The Court "held that while the Constitution did not prohibit a union from spending 'funds for the expression of political views . . . or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representatives,' the Constitution did require that such expenditures be 'financed from charges, dues, or assessments paid by employees who [did] not object to advancing those ideas and who [were] not coerced into doing so against their will by the threat of loss of government employment.'" *Keller*, 496 U.S. at 9, quoting *Abood*, 431 U.S. at 235-236.

2. The *Street/Abood* rulings—delineating the legal limitation imposed on unions in expending agency fees payable by objectors—generate the following additional legal question: what must a union that is entitled to collect agency fee payments from an objecting nonmember do to assure, on the one hand, that the objection receives a proper response and the objector is not required to finance the unions "non-collective bargaining" activities, and to also assure, on the other hand, that the objector pays his fair share of the union's "collective bargaining" costs as contemplated by the national labor policy permitting union security agreements.

The Court has devoted the most mature deliberation to that question, considering a range of alternatives prior to arriving at the answer vouchsafed in *Hudson*. In so doing, the Court has recognized the need "[t]o attain the appropriate reconciliation between majority and dissenting interests," *Street*, 367 U.S. at 773, and has been guided by the well proved axiom that "resort to litigation to settle the rights of labor organizations and employees very often proves unsatisfactory," *Allen*, 373 U.S. at 123-124.

Just two years after *Street*, the *Allen* Court suggested that "[i]f a union agreed upon a formula for ascertaining the proportion of political expenditures in its budget, and made available a simple procedure for allowing dissenters to be excused from having to pay this proportion of moneys due from them under the union-shop agreement, prolonged and expensive litigation might well be averted." 373 U.S. at 123. See also *Abood*, 431 U.S. at 240 & 242 (echoing this suggestion in the public sector context).

*Ellis v. Railway Clerks*, *supra*, began the process of putting *Allen*'s suggestion to the test. The union defendant in *Ellis*, "conced[ing] that the statutory authorization of the union shop does not permit the use of [objecting fee payers'] contributions for union political or ideological activities," had "adopted a rebate program covering such expenditures," and "[t]he Court of Appeals for the Ninth Circuit . . . held that the union's rebate plan was [legally] adequate." 466 U.S. at 439-440 & 440-441. This Court disagreed.

The *Ellis* Court emphasized that the rebate plan there "allowed the union to collect the full amount of a protesting employee's dues, use part of the dues for objectionable purposes, and only pay the rebate a year later." 466 U.S. at 441. That being so, the Court ruled that such a "rebate scheme reduces but does not eliminate the statutory violation." *Id.* at 444.

In so ruling, the *Ellis* Court recognized that where a union has adopted such a scheme "[t]he cost to the employee is, of course, much less than if the money was never returned," and that "[t]he harm would be reduced [even further] were the union to pay interest on the amount refunded. . . ." 466 U.S. at 444. But those reductions in the harm to the objector do not suffice to meet the *Street/Abood* legal requirements because "[e]ven then the union obtains an involuntary loan for purposes to which the employee objects." *Id.*

Having said that much as to the deficiencies of the *Ellis* rebate plan, the Court added that "there are readily available alternatives, such as advance reduction of dues and/or interest-bearing escrow accounts, that place only the slightest additional burden, if any, on the union." 466 U.S. at 444. And, "[g]iven the existence of acceptable alternatives," the Court held that "the union cannot be allowed to commit dissenters' funds to improper uses even temporarily." *Id.*

*Ellis* thus set the stage for the *Hudson* case. In *Hudson*, the Chicago Board of Education agreed to deduct from the pay of nonmembers represented by the Chicago Teachers Union ("CTU") "proportionate share payments" equal to 95% of normal Union dues and to transmit these fees to the CTU. 475 U.S. at 295. "Union officials computed the 95% fee" by identifying "expenditures unrelated to collective bargaining and contract administration" and "divid[ing] this amount by the Union's income for the year. . . ." *Id.* "[A] nonmember could object to the 'proportionate share' figure by writing to the Union President within 30 days after the first payroll deduction," and "[t]he objection then would meet a three-stage procedure." *Id.* at 296. The first two steps involved consideration of the objection by the CTU's Executive Committee and then by its Executive Board. *Id.* "[I]f the objector continued to protest after the Executive Board decision, the Union president would select an arbitrator from a list maintained

by the Illinois Board of Education.” *Id.* “If an objection was sustained at any stage of the procedure, the remedy would be an immediate reduction in the amount of future deductions for all nonmembers and a rebate for the objector.” *Id.*

Four nonmember fee payers filed suit challenging the Chicago Teachers Union’s objection procedure in federal district court. 475 U.S. at 297-298. The district court sustained the procedure in all respects, and the plaintiffs appealed. *Id.* at 298. Thereafter, “[t]he Union modified its position[, and] [i]nstead of defending the procedure upheld by the District Court, it advised the Court of Appeals that it had voluntarily placed all of the dissenters’ agency fees in escrow, and thereby avoided any danger that [the plaintiffs’] constitutional rights would be violated.” *Id.* at 299. The court of appeals, nevertheless, held that the Union’s procedure, even as modified to escrow the objectors’ fee payments, did not adequately protect the fee payers’ constitutional rights. *Id.* at 299-300.

This Court began by considering first “[t]he procedure that was initially adopted by the Union and considered by the District Court,” and concluded that the initial procedure “contained three fundamental flaws.” 475 U.S. at 304-305. “First, as in *Ellis*, a remedy which merely offers dissenters the possibility of a rebate does not avoid the risk that dissenters’ funds may be used temporarily for an improper purpose.” *Id.* at 305. “Second, the ‘advance reduction of dues’ was inadequate because it provided nonmembers with inadequate information about the basis for the proportionate share.” *Id.* at 306. “Finally, the original Union procedure was also defective because it did not provide for a reasonably prompt decision by an impartial decisionmaker.” *Id.* at 307. And, the Court explained that that “an expeditious arbitration might satisfy the requirement of a reasonably prompt decision by an impartial decisionmaker, so long as the arbitrator’s

selection did not represent the Union’s unrestricted choice.” 475 U.S. at 308.<sup>3</sup>

In sum, “the original Union procedure was inadequate because it failed to minimize the risk that nonunion employees’ contributions might be used for impermissible purposes, because it failed to provide adequate justification for the advance reduction of dues, and because it failed to offer a reasonably prompt decision by an impartial decisionmaker.” 475 U.S. at 309.

The Court then turned to the Chicago Teachers Union’s modified procedure and noted that the CTU’s “creat[ion] [of] an escrow of 100% of the contributions exacted from the [plaintiffs]” cured the first flaw by “eliminat[ing] the risk that nonunion employees’ contributions may be temporarily used for impermissible purposes. . . .” 475 U.S. at 309. Nevertheless, “the procedure remain[ed] flawed in two respects,” viz., “[i]t does not provide an adequate explanation for the advance reduction of dues, and it does not provide a reasonably prompt decision by an impartial decisionmaker.” *Id.*

Restating the foregoing points in affirmative terms, *Hudson* holds that, in the public sector, “the constitutional requirements for the Union’s collection of agency

<sup>3</sup> Justice White’s concurring opinion, joined by the Chief Justice, stated that “if the union provides for arbitration and complies with the other requirements specified in our opinion, it should be entitled to insist that the arbitration procedure be exhausted before resorting to the courts.” 475 U.S. at 311. Although the Court’s opinion did not speak directly to this point, it expressed apparent agreement with Justice White’s understanding of the proper sequence for fee challenges by observing that “[t]he arbitrator’s decision would not receive preclusive effect in any subsequent § 1983 action.” *Id.* at 308 n.21 (emphasis added). On remand, the Seventh Circuit was of the view that this Court’s decision clearly contemplated resort to the mandated arbitration before an objecting fee payer could challenge the union’s calculation of the fee reduction in court. *Hudson v. Chicago Teachers Union*, 922 F.2d 1306, 1314 (7th Cir.), cert. denied, 501 U.S. 1230 (1991).

fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." 475 U.S. at 310.<sup>4</sup>

<sup>4</sup> Given that the instant case arises under the Railway Labor Act, to avoid any confusion, we note that "constitutional requirements" apply to "the Union's collection of agency fees" in the public sector, *Hudson*, 475 U.S. at 310, because the union's agency shop agreement constitutes joint action with the public employer and "the actions of public employers surely constitute 'state action,'" *Abood*, 431 U.S. at 226. See *Lugar v. Edmundson Oil Co.*, 457 U.S. 922, 939-942 (1982).

Obviously, private sector agency shop agreements cannot be considered "state action" on any joint action theory, because those agreements are between private unions and private employers not government employers.

Nor does the fact that constitutional concerns formed the backdrop of this Court's RLA decisions indicate that the Constitution governs the collection of agency fees by unions under that statute. Constitutional concerns arose with respect to the RLA, because that statute preempts state laws forbidding union security agreements, and hence, in this context, "[i]f private rights are being invaded it is by force of an agreement made pursuant to federal law which expressly declares that state law is superseded." *Hanson*, 351 U.S. at 232. "Undoubtedly the [government] [i]s responsible for [its] statute," *Lugar*, 457 U.S. at 938, and, if this Court had not given a limiting construction to RLA § 2, Eleventh, the Court would have been faced with the question of whether *Congress* had acted unconstitutionally in "[t]he enactment of th[at] federal statute," *Hanson*, 351 U.S. at 232. That a limiting construction might have been necessary to save *the statute*, does not imply, however, that the action of railroad or air line sector private parties in negotiating union security agreements permitted by the RLA is subject to constitutional constraints. To the contrary, "action by a private party pursuant to [a] statute, without something more, [i]s not sufficient to justify a characterization of that party as a 'state actor.'" *Lugar*, 457 U.S. at 939 (emphasis added).

It is also worthy of note that the amorphous constitutional concerns raised by the RLA do not even come into play with respect to the National Labor Relations Act, because that statute does not preempt state laws forbidding union security agreements. See *Beck*, 487 U.S. at 761. And the general rule is that

3. The "objective" of a procedure of the kind specified in *Hudson*, then, is two-fold: first, to fully vindicate the right of objecting nonmember fee payers by "preventing compulsory subsidization of ideological activity by employees who object thereto;" and second, to do so "without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." *Hudson*, 475 U.S. at 302, quoting *Abood*, 431 U.S. at 237.

A *Hudson* objection procedure meets these dual objectives by providing that the fees of objecting nonmembers will be promptly reduced on the basis of the union's calculation of its "collective-bargaining" and "non-collective-bargaining" expenditures, that the objecting fee payers will be given "sufficient information to gauge the propriety of the union's fee," and that these fee payers will have a means to preclude the union's use of the amounts "reasonably in dispute" while any challenge to the reduced fee is promptly resolved by an "impartial decisionmaker." 475 U.S. at 306-307 & 310.

Where this procedure is in place, an objecting fee payer has *no* cognizable complaint that he is being compelled to subsidize "non-collective bargaining" union expenditures until the procedure has run its course. To the extent that the objector puts any such expenditure into reasonable dispute, that triggers the escrow of the disputed portion of his payments and prompt review of the union's calculation by an impartial decisionmaker.

By reason of the structure and design of the *Hudson* procedure, in other words, prior to the procedure's terminal point, *no* objector can be compelled to finance *any* nonchargeable union activities. Thus, so long as the

government inaction in refusing to prohibit certain private conduct does *not* constitute constitutionally reviewable government action. See *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 337-338 & n.15 (1987).

*Hudson* procedure works as a unified whole, the procedure serves to "eliminate the statutory violation," *Ellis*, 466 U.S. at 444—viz., "the spending of [the objectors'] funds for purposes not authorized by the Act in the face of their objection," *Street*, 367 U.S. at 771. And, a union that has adopted such a procedure "should not in fairness be subjected to sanctions in favor of an employee who makes no complaint of the use of his money for such activities." *Street*, 367 U.S. at 774.

At the same time, by providing for a prompt determination by an impartial decisionmaker and thereby limiting the period of time that funds appropriately owing to the union must remain in escrow, the *Hudson* procedure—working as a unified whole—accommodates the objectors' interests "without [unnecessarily] restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." *Abood*, 431 U.S. at 237. See *Hudson*, 475 U.S. at 310 (recognizing the interest in limiting the escrow requirement). And, the *Hudson* procedure also serves to safeguard a union that has taken the proper steps "to prevent compulsory subsidization of ideological activity by employees who object thereto," 475 U.S. at 237, from having the dues and fees properly payable to the organization eroded in financing the defense of unnecessary objecting fee payer litigation.

By treating completion of the *Hudson* procedure as a matter entirely within the discretion of the objecting fee payer, the decision below permits an objector who short-circuits the procedure to proceed in court on the fiction

<sup>5</sup> The costs of defending such litigation can easily consume the union's agency fee receipts. In such litigation, the union "bears the burden of proving [the] proposition [of political to total union expenditures]," and such proof entails "difficult accounting problems. . . ." *Allen*, 373 U.S. at 122. What's more, the union is likely to have to re-prove the proportion for each fiscal year, "since the proportion of the union budget devoted to political activities may not be constant." *Id.*

that the union is compelling him to subsidize nonchargeable union activities, when in fact this "forced subsidization" is the result of his voluntary decision to disregard a straightforward means of preventing any such use of his fee payments. Permitting the fabrication of such premature lawsuits, we submit, cuts deeply against the interests served by the *Hudson* rules.

And, of course, the decision below completely ignores the union's interest in being able to commit its dues and fee income to defraying the costs of its collective bargaining function, and to do so reasonably promptly and in a manner that spreads those costs equally among all represented employees.

On both scores, the court of appeals' decision is out of line with the general course of this Court's agency fee jurisprudence and at odds with the logic of the Court's *Hudson* decision.

4. It is also very much to the point that requiring that the *Hudson* "arbitration procedure be exhausted before [an objector may] resort[] to the courts." *Hudson*, 475 U.S. at 311 (White, J., concurring), achieves an "appropriate reconciliation between majority and dissenting interests," *Street*, 367 U.S. at 773, by minimizing the possibility of "prolonged and expensive litigation," *Allen*, 373 U.S. at 123.

In the first place, allowing an arbitrator to review an objector's challenge to the fee calculation "might lead to nonjudicial resolution" of the dispute either by "offer[ing] him a favorable settlement" or by "demonstrat[ing] that his underlying . . . claim was without merit." *Clayton v. Automobile Workers*, 451 U.S. 679, 689 (1981). See *Communications Workers v. AT&T*, 40 F.3d 426, 432 (D.C. Cir. 1994) ("[T]he exhaustion requirement may render subsequent judicial review unnecessary in many ERISA cases because a plan's own remedial procedures will resolve many claims."). To the extent the arbitrator

rules in the objector's favor and his escrowed funds are turned over to him, the objector secures complete vindication. The union will have never used those funds, and the objector will be compensated for the temporary deprivation by the accumulated interest. To the extent the arbitrator rules against the objector, the process of requiring the union to prove the correctness of its calculation and of securing the arbitrator's explanation of why she accepted the union's calculation as proper and its supporting proof as sufficient, may satisfy the objector that his claim is without merit.

Even if the arbitration process does not satisfy the objector's claim, the record established in the arbitration and the arbitrator's award are likely to be of assistance to a trial court in managing a lawsuit challenging the calculation. See *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992) ("[E]ven where a controversy survives administrative review, exhaustion of the administrative procedure may produce a useful record for subsequent judicial consideration, especially in a complex or technical factual context."). This is true, even if "[t]he arbitrator's decision would not receive preclusive effect in any subsequent . . . action." *Hudson*, 475 U.S. at 308 n. 21, citing *McDonald v. West Branch*, 466 U.S. 284 (1984).

"Where an arbitral determination gives full consideration to an employee's [statutory or constitutional] rights, a court may properly accord it great weight. This is especially true where the issue is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record." *McDonald*, 466 U.S. at 293 n. 13, quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 60 n. 21 (1974). See also *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 743-744 n. 22 (1981).

Indeed, the American Arbitration Association Rules for Impartial Determination of Union Fees, incorporated

into the objection procedure of the Air Line Pilots Association in this case, go far to insure that the arbitration decisions will be entitled to substantial weight in subsequent litigation. In the first place, the AAA itself selects the arbitrator to decide any particular dispute from among "a special panel of arbitrators experienced in employment relations." Pet. App. 2a. Such arbitrators are familiar with the practicalities of collective bargaining and contract administration, and their views as to what activities are unrelated to collective bargaining will accordingly be entitled to respectful consideration. And, the AAA Rules insure that the arbitrator's views in this regard will be fully articulated by providing that the award "shall be accompanied by a written explanation of the arbitrator's decision." Jt. App. 93.

Moreover, the AAA Rules provide for the compilation of "an adequate record." *McDonald*, 466 U.S. at 293 n. 13. Under the Rules, "[t]he burden is upon the union to justify whatever fees are being disputed." Jt. App. 85. In addition, the Rules state that "[t]he parties . . . shall produce such additional evidence as the arbitrator may deem necessary to an understanding and determination of the dispute" and that "[t]he arbitrator shall determine when sufficient evidence has been submitted for an understanding and determination of the dispute[,] [a]t which point, the arbitrator may declare the hearings closed." *Id.* at 90 & 91.

This Court has assigned to the union "the burden of proving" the validity of the fee calculation because "the union[] possess[es] the facts and records from which the proportion of political to total union expenditures can reasonably be calculated. . . ." *Allen*, 373 U.S. at 121. As in other contexts where the burden of producing evidence is assigned to a defendant, this allocation of "evidentiary burdens serves to bring the litigants and the court expeditiously and fairly to th[e] ultimate question." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248,

253 (1981). The AAA Rules further this process by allowing the arbitrator to keep the record open until she is satisfied that the union has produced all available evidence "sufficient" and "necessary to an understanding and determination of the dispute" over the fee. Jt. App. 90-91. And, once again, the Rules require "a written explanation" of why the arbitrator found the evidence sufficient to justify the fee or insufficient for that purpose. Jt. App. 93.

The arbitrator's decision, together with the record on which it is based, could thus provide a proper basis for resolving a subsequent court case on summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Alternatively, the arbitration award and record could serve as the basis for managing the discovery process and the presentation of evidence at trial. *See Pet. App. 20a*. The union's evidence in support of its calculation will have been assembled in the arbitration record and the arbitrator's decision will provide a neutral review of the sufficiency of that evidence. In the face of such a record, the objecting fee payer can reasonably be required to identify in what respects the union's evidence accepted by the arbitrator is insufficient to justify the fee.

Allowing the arbitration award and record to play such a role in any subsequent litigation would encourage both the union and the objecting fee payers to treat that process seriously. As a result, the hearing before the arbitrator will be more likely to produce the sort of record and award that either will eliminate entirely subsequent litigation or will greatly assist the court in efficiently disposing of such litigation. Conversely, allowing objecting fee payers to bypass the arbitration process and bring their challenges to the fee calculation directly to court, would tend to discourage the development of procedures that could either eliminate or minimize the scope of agency fee litigation. *See Republic Steel Corp. v. Maddox*, 379 U.S. 650, 656 (1965).

## CONCLUSION

The judgment below should be reversed and this case should be remanded to the court of appeals for further proceedings consistent with this Court's decision.

Respectfully submitted,

JONATHAN P. HIATT  
JAMES B. COPPES  
815 16th Street, N.W.  
Washington, D.C. 20006

LAURENCE GOLD  
(Counsel of Record)  
1000 Connecticut Avenue, N.W.  
Washington, D.C. 20036  
(202) 833-9340

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No. 97-428

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1997

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AIR LINE PILOTS ASSOCIATION,  
*Petitioner,*  
v.

ROBERT A. MILLER, *et al.*,  
*Respondents.*

---

On Writ of Certiorari to the  
United States Court of Appeals  
for the District of Columbia Circuit

---

**BRIEF OF THE NATIONAL EDUCATION ASSOCIATION  
AS AMICUS CURIAE  
IN SUPPORT OF PETITIONER**

---

ROBERT H. CHANIN  
*(Counsel of Record)*  
JEREMIAH A. COLLINS  
JONATHAN D. HACKER  
BREDHOFF & KAISER, P.L.L.C.  
1000 Connecticut Avenue, N.W.  
Suite 1300  
Washington, D.C. 20036  
(202) 833-9340



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**BRIEF OF THE NATIONAL EDUCATION ASSOCIATION  
AS AMICUS CURIAE  
IN SUPPORT OF PETITIONER**

---

This brief *amicus curiae* is filed by the National Education Association ("NEA") in support of petitioner Air Line Pilots Association ("ALPA") with the written consent of the parties.<sup>1</sup>

**INTEREST OF AMICUS CURIAE**

NEA is a nationwide employee organization, with a current membership of some 2.3 million members, the vast majority of whom are employed by public school districts, colleges, and universities. NEA operates through a network of affiliated organizations: it has as state affili-

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<sup>1</sup> No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

ates an organization in each of the 50 states, the District of Columbia, and Puerto Rico, and has approximately 12,000 local affiliates in individual school districts, colleges, and universities throughout the United States.

NEA and many of its affiliates are parties to agency shop arrangements that are subject to the procedures prescribed by this Court in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986). To implement *Hudson's* requirements, NEA and many of its affiliates have adopted procedures under which nonmember employees who object to contributing to the costs of certain union activities may present their objections to an impartial decisionmaker—in most cases, as here, an arbitrator selected by the American Arbitration Association.

The question whether an objecting nonmember is free to bypass that procedure and to challenge a proposed agency fee in federal court in the first instance is a recurring issue of great practical importance to NEA and its affiliates. That question recently was decided adversely to NEA and its Alaska affiliates in *Knight v. Kenai Peninsula Borough Sch. Dist.*, 1997 WL 751724, at \*9-10 (9th Cir. Dec. 8, 1997), a case in which a petition for certiorari will shortly be filed.

#### SUMMARY OF THE ARGUMENT

The procedural requirements for the agency shop set forth in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986), are the product of a careful balance between the government's interest in promoting stable labor relations through a system of collective bargaining conducted by an exclusive representative financially supported by all employees, and the First Amendment rights of employees who object to the compelled expenditure of their funds for political or ideological activities.

A fair appraisal of the competing interests identified in *Hudson* supports the conclusion that, where a union has

established an impartial decisionmaking procedure to resolve objections to its proposed agency fee, and has established as well an escrow for the funds that are subject to that procedure, an objecting nonmember who has not pursued his objections to the fee through the impartial decisionmaking procedure cannot claim that the union violated the First Amendment by collecting and expending the fee.

That view accords with the nature of the system of procedures mandated by the Court in *Hudson*. The Court there stated that a portion of each objecting nonmember's agency fee, representing all amounts reasonably in dispute, must be placed in escrow *pending the ruling of the impartial decisionmaker*. That system contemplates that all objections will be subject to the impartial decisionmaking procedure, and the various components of the system would not fit together otherwise.

Furthermore, to hold that a nonmember cannot mount a First Amendment challenge to a union fee if he has not availed himself of the impartial decisionmaking process does not harm the nonmember's First Amendment interest as recognized in *Hudson*, because the escrow ensures that the objector's funds will not be spent on ideological activities while the impartial decisionmaking process is pursued. On the other hand, such a holding promotes the important government interest recognized in *Hudson* and in this Court's other agency fee cases, by enabling the union to have reasonably prompt access to funds it needs to execute its collective-bargaining duties without incurring undue expense.

This approach does not transgress the rule that individuals need not exhaust state remedies before proceeding to litigate federal constitutional claims. No state procedure is proposed here; Congress has not expressed any intent concerning exhaustion in this context; and the balance of interests decidedly favors requiring objecting nonmembers to pursue the impartial decisionmaking process. If this

be deemed an "exhaustion of remedies" requirement, the requirement is both permissible and appropriate.

However, properly viewed, to hold that an objecting nonmember who has not pursued the union's impartial decisionmaking procedure cannot mount a First Amendment challenge to the agency fee is *not* to require exhaustion of a nonjudicial remedy for a First Amendment violation. Rather, it is to recognize, in harmony with this Court's approach in other First Amendment cases, that where the government requires persons who seek to exercise certain rights of expression to participate in a reasonable procedure to determine whether the proposed speech will be permitted, and an individual chooses to bypass the mandated procedure, the government's subsequent action in suppressing (or here, compelling) the speech in question simply works no First Amendment violation.

#### ARGUMENT

#### I. TO HOLD THAT A NONMEMBER CANNOT MOUNT A JUDICIAL CHALLENGE TO AN AGENCY FEE IF HE HAS NOT PURSUED THE IMPARTIAL DECISIONMAKING PROCESS ESTABLISHED BY A UNION PURSUANT TO HUDSON BEST EFFECTUATES THE PROCEDURAL SYSTEM MANDATED BY THAT DECISION, AND PROPERLY RECONCILES THE COMPETING INTERESTS INVOLVED

##### A.

As in other contexts where the pursuit of important government interests implicates First Amendment concerns,<sup>2</sup> this case calls upon the Court to fashion an accommodation of competing interests.

<sup>2</sup> The case before the Court arises in the private sector, under the Railway Labor Act. The parties and the court below proceeded on the premise that this Court's public sector First Amendment holding in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S.

On the one hand, an employee has a right under the First Amendment not to be required by government action "to contribute to the support of an ideological cause he may oppose as a condition of holding a job." *Abood v. Detroit Board of Education*, 431 U.S. 209, 235 (1977). See also *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 516 (1991); *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 301-302 (1986).

On the other hand, from its earliest decisions addressing the First Amendment implications of the agency shop,<sup>3</sup> the Court has recognized that the interests of dissenting members of a bargaining unit are not to be protected in a manner that "encroach[es] on the legitimate activities or necessary functions of the unions." *Machinists v. Street*, 367 U.S. 740, 774 (1961). See also *Railway Clerks v. Allen*, 373 U.S. 113, 120, 122 (1963). In particular, since *Railway Employees' Dept. v. Hanson*, 351 U.S. 225 (1956), it has been settled that the government may require "financial support of the collective-bargaining agency by all who receive the benefits of its work," *id.* at 238, in order to further "industrial peace and stabilized labor-management relations." *Id.* at 234. See also *Street*, 367 U.S. at 771 ("[R]estraining collection of [agency fees] . . . might well interfere with the appellant unions' performance of those functions and duties which the Rail-

292 (1986), is applicable here. For that reason, and because NEA's affiliates are largely public sector unions whose employers are directly subject to the First Amendment, this brief will treat the question presented as a matter of First Amendment law.

<sup>3</sup> "Under an 'agency shop' arrangement, a union that acts as exclusive bargaining representative may charge nonunion members, who do not have to join the union or pay union dues, a fee [the 'agency fee' or 'service charge'] for acting as their bargaining representative." *Hudson*, 475 U.S. at 303 n.10. Some of the Court's union fee cases have involved an arrangement known as the "union shop." For purposes of the argument in this brief it is not necessary to distinguish between these two types of union security arrangements.

way Labor Act places upon them to attain its goal of stability in the industry.”).

In *Abood*, the Court developed more fully the analysis adumbrated in *Hanson*, *Street* and *Allen*, explaining that to require all members of a bargaining unit to contribute financially to the union may properly be viewed as a vital component of “[t]he principle of exclusive representation, which . . . is a central element in the congressional structuring of industrial relations.” 431 U.S. at 220. The Court described the government interests that are served by the agency shop as follows:

The designation of a single representative avoids the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment. It prevents inter-union rivalries from creating dissension within the work force and eliminating the advantages to the employee of collectivization. It also frees the employer from the possibility of facing conflicting demands from different unions, and permits the employer and a single union to reach agreements and settlements that are not subject to attack from rival labor organizations.

The designation of a union as exclusive representative carries with it great responsibilities. The tasks of negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones. They often entail expenditure of much time and money. See *Street*, 367 U.S., at 760. The services of lawyers, expert negotiators, economists, and a research staff, as well as general administrative personnel, may be required. Moreover, in carrying out these duties, the union is obliged “fairly and equitably to represent all employees . . . , union and nonunion,” within the relevant unit. *Id.*, at 761. A union-shop arrangement has been thought to distribute fairly the cost

of these activities among those who benefit, and it counteracts the incentive that employees might otherwise have to become “free riders”—to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees.

*Id.* at 220-222 (citations omitted).

Concluding on this basis that the agency shop serves “important government interests,” *id.* at 225, the Court held in *Abood* that those interests justify the agency shop in the public sector as well as in the private sector. *Id.* See also *Lehnert*, 500 U.S. at 517 (“[T]he Court [in *Abood*] indicated that the considerations that justify the union shop in the private context—the desirability of labor peace and eliminating ‘free riders’—are equally important in the public-sector workplace.”).

The Court thus has recognized that, although compelling an employee to provide financial support even for collective bargaining activities implicates First Amendment interests,<sup>4</sup> “the judgment clearly made in *Hanson* and *Street* is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress” or by state or local governments. *Abood*, 431 U.S. at 222. See also *Lehnert*, 500 U.S. at 517 (discussing *Abood*); *Ellis v. Railway Clerks*, 466 U.S. 435, 455-456 (1984) (“It has long been settled that such interference with First Amendment rights [as is entailed by the agency shop] is justified by the governmental interest in industrial peace.”); *Hudson*, 475 U.S. at 301 n.8.

Having emphasized that First Amendment challenges to agency fees implicate important government interests, the Court repeatedly has admonished that such challenges

<sup>4</sup> See *Lehnert*, 500 U.S. at 516; *Hudson*, 475 U.S. at 301; *Abood*, 431 U.S. at 222.

must be resolved in a manner that "attain[s] the appropriate reconciliation between majority and dissenting interests . . . [by] protect[ing] both interests to the maximum extent possible without undue impingement of one on the other." *Street*, 367 U.S. at 773. See also *Allen*, 373 U.S. at 122 (stating that even if a union violated the rights of dissenting employees by spending their compelled fees on political activities, "no decree would be proper which appeared likely to infringe the unions' right to expend uniform exactions under the union-shop agreement in support of activities germane to collective bargaining"). As the Court put it in *Abood*, "the objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." 431 U.S. at 237.

#### B.

In *Hudson*, the Court quoted the foregoing passage from *Abood* as stating the "objective" that would guide the Court in fashioning "[p]rocedural safeguards" to "protect[] the basic distinction drawn in *Abood*" between ideological activities, which dissenting employees cannot be required to support, and activities germane to collective bargaining, as to which the important government interests described in *Abood* permit the government to require every employee to contribute equally. *Hudson*, 475 U.S. at 302.<sup>5</sup>

To achieve that objective, the Court devised a balanced, integrated and carefully nuanced system. Before a union may compel any funds from a nonmember, it must provide

<sup>5</sup> We will use the terms "ideological activities" and activities "germane to collective bargaining" as shorthand for the somewhat more complex dichotomy discussed in *Lehnert* between those activities to which objecting nonmembers constitutionally may not be required to contribute financially, and those for which they may be charged.

a notice disclosing expenditure information that a nonmember needs in order to determine whether to object in any respect to the fee the union proposes to charge. *Id.* at 306-307. However, the notice need not be more "exhaustive and detailed" than is practicable for the union. *Id.* at 307 n.18. If the nonmember, having received the union's notice, wishes to prevent the union from spending his money on matters that he believes are not germane to collective bargaining, he has "the burden of raising an objection." *Id.* at 306. See also *Abood*, 431 U.S. at 238; *Street*, 367 U.S. at 774. However, "[t]he nonmember's 'burden' is simply the obligation to make his objection known," *Hudson*, 475 U.S. at 306 n.16; thus the nonmember need not identify the specific expenditures, or even the specific categories of expenditures, to which he objects. *Abood*, 431 U.S. at 241.

Upon receiving an objection, the union must place in escrow "the amounts reasonably in dispute," *Hudson*, 475 U.S. at 310, so as to avoid using objectors' funds even "temporarily for an improper purpose." *Id.* at 305. Although *Hudson* held "that a 100% escrow is not constitutionally required," *id.* at 310, the Court expressly declined to decide how a union could determine "the size of any appropriate [lesser] escrow." *Id.* Given that uncertainty, and the difficulty of defining the amounts "reasonably in dispute" in circumstances where nonmembers have not been required to identify any specific objections, NEA and its affiliates typically escrow substantially more of an objector's fee than is ultimately determined not to be chargeable.<sup>6</sup>

<sup>6</sup> In some circumstances a union may choose to reduce an objector's fee in advance instead of or in addition to an escrow. The interplay between "advance reductions" and escrows need not be explored here. See generally *Grunwald v. San Bernadino City Unified Sch. Dist.*, 994 F.2d 1370 (9th Cir.), cert. denied, 510 U.S. 964 (1993).

Indeed, no matter how narrowly a union might seek to apply *Hudson*, the decision necessarily requires unions to escrow a significant amount of money that is not in fact the subject of a valid objection, because (i) the universe of "reasonable" objections is by definition broader than the universe of *valid* objections, and (ii) in the absence of any specific statement of the nature and extent of a nonmember's objection, a union must escrow for *every* objector all monies that reasonably may be disputed by *any* objector, even though an individual objector may in reality have an objection to only a small subset of expenditures.<sup>7</sup>

Having required unions to establish an escrow as described, *Hudson* also specified how and when the money is to be released from escrow: the Court held that a union must provide to objectors "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute *while such challenges are pending*." *Id.* at 310 (emphasis added).

Thus, *Hudson* contemplates a system in which (i) any nonmember who wishes to oppose the union's use of his or her funds for expenditures described in the union's notice must lodge an objection, (ii) a portion of each objector's fee (generally exceeding the portion that actually is nonchargeable) then will be held in escrow pending a prompt resolution of the objection by the impartial decisionmaker, and (iii) when the impartial decisionmaker has ruled on the objection, the escrow will terminate and the funds that have been held will be distributed.

<sup>7</sup> For example, an employee who objects to contributing to a union's lobbying on *some* issues would not necessarily be opposed to the union's lobbying on every other issue. Thus an employee who favors tax cuts might not want to support a union's efforts to oppose them, but still might fully support the union's lobbying on behalf of worker safety legislation or other matters. So too, an employee who objects generally to contributing to a union's lobbying might not object to supporting other union activities that may not be germane to collective bargaining.

## C.

In *Hudson* the Court was not called upon to decide whether a nonmember who does not avail himself of the union's impartial decisionmaking procedure may challenge in court the union's exaction and expenditure of fees. Nor did the Court expressly address that question, with the exception of Justice White and Chief Justice Burger, who stated in a concurring opinion that, "if the union provides for arbitration and complies with the other requirements specified [by the Court in *Hudson*], it should be entitled to insist that the arbitration procedure be exhausted before resorting to the courts." *Id.* at 311 (White, J., concurring).

Although the issue was not decided, the opinion of the Court in *Hudson*, fairly read, contemplates that all objectors will proceed through the impartial decisionmaking process established by the union. As we have seen, in describing the escrow procedure that applies to *all* objectors, the Court stated that the escrow must remain in effect while challenges "*before [the] impartial decisionmaker . . . are pending*." *Id.* at 310 (opinion of the Court) (emphasis added). That description contemplates that *all* objections will be resolved by the impartial decisionmaker; and the Court did not describe any *other* mechanism for terminating the escrow of an objector's funds.

If *Hudson* were not understood as we suggest, the various components of the procedural system described by the Court would not fit together. *Hudson* surely does not imply that, if a nonmember prefers litigation to arbitration,<sup>8</sup> the union must escrow the nonmember's funds until the litigation winds its way to conclusion.<sup>9</sup> Indeed, a

<sup>8</sup> We refer to the impartial decisionmaking process as "arbitration" because that is the procedure at issue in this case, and it is the procedure used by NEA and many of its affiliates.

<sup>9</sup> Such a suggestion would be untenable, both because litigation is inherently more protracted than arbitration, and because a non-

nonmember who intends to bypass the arbitration procedure and to proceed solely through litigation should not be entitled to an automatic escrow in the first place. Cf. *Allen*, 373 U.S. at 120 (holding that "dissenting employees . . . can be entitled to no relief until final judgment in their favor is entered," and that until they win such a judgment, "they must pay to the bargaining representative . . . all sums required under the Agreement"). The requirement that a union, having received only a general objection from a nonmember, must establish an escrow to prevent expenditure of the nonmember's money on *any* activity as to which *any* nonmember could raise a "reasonable," even if nonmeritorious, objection, makes sense only if, as *Hudson* indicates, the escrow procedure is linked to an expeditious impartial decisionmaking process through which all objections will be considered.

#### D.

That interpretation of *Hudson* also best comports with the "objective . . . [of] devis[ing] a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." *Hudson*, 475 U.S. at 302 (internal quotation marks omitted).

To require resort to the arbitration process does not interfere with the objective of "preventing compulsory subsidization of ideological activity by employees who object thereto." All money reasonably in dispute is escrowed during the arbitration process; the process is impartial;<sup>10</sup> and, if an objector is dissatisfied with the

member pursuing a judicial challenge to a union fee would have no legal obligation, and often no practical incentive, to proceed expeditiously, whereas a union has both the obligation under *Hudson*, and the practical incentive, to see to it that the arbitration process is "expeditious." *Id.* at 308 n.21.

<sup>10</sup> *Hudson* explicitly requires an impartial decisionmaker. *Id.* at 307-309. Respondents have questioned whether the procedure used

arbitrator's decision, he then may take the matter to court. In the public sector, as the Court observed in *Hudson*, such litigation would take the form of a "subsequent § 1983 action" in which "[t]he arbitrator's decision would not receive preclusive effect." *Id.* at 308 n.21 (emphasis added).

On the other hand, the *other* interest that must be taken into account, and "protect[ed] . . . to the maximum extent possible without undue impingement . . . on the other," *Street*, 367 U.S. at 773—the interest in not "restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities," *Hudson*, 475 U.S. at 302—is promoted by requiring objectors to avail themselves of the arbitration process.

If the rule were otherwise, a union would have to proceed to arbitration with respect to those objectors who choose arbitration (because *Hudson* requires unions to provide a nonjudicial procedure, *id.* at 307-308 & n.20), while proceeding at the same time to litigation at the demand of those objectors who wish to bypass the arbi-

by petitioner ALPA, by NEA and many of its affiliates, and by most other unions—viz., utilization of an arbitrator selected by the American Arbitration Association—satisfies *Hudson*'s impartiality requirement. However, *Hudson* itself strongly indicates an affirmative answer to that question, *id.* at 308 n.21, as has every court that has addressed the matter. See *Grunwald v. San Bernardino City Unified Sch. Dist.*, 994 F.2d 1370, 1376-77 (9th Cir.), *cert. denied*, 510 U.S. 964 (1993); *Weaver v. University of Cincinnati*, 970 F.2d 1523, 1534-35 (6th Cir. 1992), *cert. denied*, 507 U.S. 917 (1993); *Ping v. National Educ. Ass'n*, 870 F.2d 1369, 1373 (7th Cir. 1989); *Andrews v. Education Ass'n of Cheshire*, 829 F.2d 335, 340 (2d Cir. 1987); *Damiano v. Matish*, 830 F.2d 1363, 1371 (6th Cir. 1987); *Kidwell v. Transportation Comm'n's Int'l Union*, 731 F. Supp. 192, 204 (D. Md. 1990), *aff'd on other grounds*, 946 F.2d 283 (4th Cir. 1991), *cert. denied*, 503 U.S. 1005 (1992).

In any event, this question was not raised below and is not encompassed in the grant of certiorari. The question presented here is whether, when a union has provided a decisionmaking process that complies with *Hudson*'s impartiality requirement, an objector must proceed through that process.

tration. This would be the most expensive and burdensome system imaginable, and it would deprive a union of the "time and money" it needs to carry out its "great responsibilities" as exclusive bargaining agent. *Abood*, 431 U.S. at 221.

Under our interpretation of *Hudson*, in contrast, there will be a single impartial forum in which all objections are considered expeditiously and without undue expense. It is to be expected—and NEA's experience confirms—that objectors often will find that the arbitrator's decision satisfactorily resolves their objections. After all, at the time a nonmember notes an objection, he may not have any clear understanding of the law; and, because of the unavoidable limitations on the extent of the information that can practicably be conveyed in a notice, the objector also may be under a misconception as to the nature of the union's actual expenditures and practices. Thus, objections that are asserted upon receipt of a "*Hudson* notice" are, as a class, particularly amenable to resolution through procedures short of formal litigation.

To be sure, in some cases an objector who has submitted his objection to the arbitrator for resolution will be dissatisfied with the arbitrator's decision and will choose, as *Hudson* allows, to pursue a "subsequent § 1983 action." But in most cases, arbitration will prove to be a "more practical alternative[] to litigation for the vindication of the rights and accommodation of interests here involved." *Allen*, 373 U.S. at 124. And what this Court has stated with respect to administrative procedures applies here to arbitration procedures as well: "[E]ven where a controversy survives administrative review, exhaustion of the administrative procedure may produce a useful record for subsequent judicial consideration." *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992).<sup>11</sup> In all events,

<sup>11</sup> In holding that an agency fee arbitration decision "would not receive preclusive effect in any subsequent § 1983 action," *id.* at 308 n.21, *Hudson* cited the Court's decision in *McDonald v. City*

because the arbitration is impartial, *see supra* note 10, there is no reason in *any* case for an objector to assume from the outset that only a court, and not the arbitrator, can fairly resolve his objection.

*of West Branch*, 466 U.S. 284 (1984). It is important to recognize that the description and characterizations of the labor contract arbitration process that appear in *McDonald* do not describe the nature of agency fee arbitration, particularly as conducted (in the case at bar, and in the case of NEA) under the American Arbitration Association's Rules for Impartial Determination of Union fees ("AAA Rules"). Unlike labor contract arbitration, *see McDonald*, 466 U.S. at 290-291, the AAA agency fee arbitration system explicitly requires the arbitrator to apply the requirements of federal law. *See* AAA Rules 1 and 3, Joint Appendix (JA) 88. Also unlike labor contract arbitration, *see McDonald*, 466 U.S. at 291, in agency fee arbitration the union does not control the presentation of the objecting nonmembers' case. *See* AAA Rule 2, JA 88 (objectors have party status in the arbitration); AAA Rule 12 ("[t]he arbitrator shall determine how the case can best be presented so that all parties have a fair opportunity to contest the issues"). Finally, although formal rules of evidence and discovery do not apply, *cf. McDonald*, 466 U.S. at 291, AAA Rule 14 gives an agency fee arbitrator the authority to require a union to "produce such additional evidence as the arbitrator may deem necessary to an understanding and determination of the dispute." JA 90. Particularly when one considers that agency fee challenges turn on objective, ascertainable facts—essentially, the factual component of such a challenge boils down to identifying the activities in which the union has engaged and what it has spent on those activities—and that, under *Hudson*, objectors already have received a notice informing them of the union's expenditures, *see* 475 U.S. at 307 n.18, there is no reason why Rule 14 should not enable objectors to obtain sufficient "discovery." To the extent that the decision in *Bromley v. Michigan Educ. Ass'n-NEA*, 82 F.3d 686 (6th Cir. 1996), may suggest otherwise, the decision is unfounded. In *Bromley*, the objecting nonmembers did not make any unsuccessful request for discovery in the arbitration. Rather, most of them boycotted the arbitration, and, consistent with its usual practice, the National Right to Work Legal Defense Foundation, which provided counsel for the plaintiffs in *Bromley*, declined to provide assistance in the arbitration proceeding, *id.* at 690 n.1, and then, having made no effort to obtain discovery in the arbitration, sought extensive discovery in a subsequent § 1983 action. *Id.* at 688.

In sum, unless a nonmember's objective is simply to heap expense on a union—an objective that would be facilitated by depriving unions of the right to have objections resolved in an expeditious and inexpensive manner<sup>12</sup>—there is no reason why an objector should wish to bypass the arbitration process and proceed initially in court instead. And, whatever may be an individual objector's motives or perceptions, the dispositive point is that to require resort to arbitration promotes the important interest of enabling unions to collect and expend funds for collective bargaining activities without incurring undue cost and delay, without compromising in the least the objector's interest in not being compelled to subsidize ideological activities.

**II. TO HOLD THAT A NONMEMBER CANNOT MOUNT A JUDICIAL CHALLENGE TO AN AGENCY FEE IF HE HAS NOT PURSUED THE IMPARTIAL DECISIONMAKING PROCESS IS NOT TO REQUIRE AN INAPPROPRIATE EXHAUSTION OF REMEDIES**

To hold that a nonmember cannot challenge a union's collection or expenditure of fees if he has bypassed the arbitration procedure is not to impose an "exhaustion of remedies" requirement such as would be impermissible in a § 1983 action under *Patsy v. Board of Regents*, 457 U.S. 496 (1982). This is so for two reasons.

<sup>12</sup> The potential to use agency fee challenges as a means of crippling unions has not gone unnoticed by the National Right to Work Legal Defense Foundation. Cf. *Gilpin v. AFSCME*, 875 F.2d 1310, 1313 (7th Cir.) (Posner, J.) (stating that the "remedy sought by the National Right to Work Legal Defense Foundation, which represents the nine named plaintiffs, is consistent with—and only with—the aims of the . . . type of employee" who "wants to weaken and if possible destroy the union"), *cert. denied*, 493 U.S. 917 (1989); *id.* at 1316 ("[T]he plaintiffs and the National Right to Work Foundation are merely trying to hamstring the union.").

**A. An Exhaustion Rule Would Be Permissible in This Context**

First, *Patsy* holds only that a § 1983 plaintiff need not exhaust "state administrative remedies." *Id.* at 498. See also *id.* at 505 (noting "the belief of the 1871 Congress that the *state authorities* had been unable or unwilling to protect . . . constitutional rights") (emphasis added). The *Hudson* impartial decisionmaking process is not a state administrative remedy; it is a procedure created by and governed by federal law.

Because Congress has not clearly spoken with respect to the matter, if the approach we advocate is properly characterized as one of "exhaustion of remedies," then the question whether to require such exhaustion is to be determined by this Court in accordance with "sound judicial discretion." *McCarthy v. Madigan*, 503 U.S. at 144. At least one of the grounds on which courts traditionally have required exhaustion—to "promote[] judicial efficiency," *id.* at 145—plainly is applicable here. If objections must be taken to arbitration, "a judicial controversy may well be mooted, or at least piecemeal appeals may be avoided." *Id.* "And even where a controversy survives . . . review, exhaustion of the . . . procedure may produce a useful record for subsequent judicial consideration, especially in a complex or technical factual context." *Id.* On the other hand, the kinds of circumstances that have been held to weigh against exhaustion—"an unreasonable or indefinite timeframe for . . . action," *id.* at 147, a lack of power to grant effective relief, *id.* at 147-148, or the presence of bias, *id.* at 148—are not presented here. An exhaustion-of-remedies requirement therefore would be consistent with this Court's exhaustion jurisprudence.

**B. To Hold that a Union Does Not Violate the First Amendment by Spending the Funds of a Nonmember Who Has Declined to Participate in the Impartial Decisionmaking Process Is Not to Require Exhaustion of Remedies, But Rather Is to Recognize that There Has Been No Constitutional Violation to Remedy**

There is a more fundamental reason why the position we advocate is not at odds with *Patsy's* "no exhaustion" rule: to hold that a nonmember may not bypass a union's agency fee arbitration process and then mount a First Amendment challenge to the fee is *not* to require exhaustion of a remedy for any constitutional violation. Rather, the *Hudson* procedures exist to "avoid the risk" of a constitutional violation in the first place. *Hudson*, 475 U.S. at 305.

The *Hudson* procedures thus serve a function that is closely analogous to procedures the government may require in other First Amendment contexts, such as licensing and the granting of permits. This Court has allowed the government to require would-be speakers to follow reasonable procedures to obtain a license or a permit for certain forms of expression, such as public parades or the exhibition of motion pictures, despite the fact—absent here—that such speech is *suppressed by the government* while such proceedings are conducted. See, e.g., *Cox v. New Hampshire*, 312 U.S. 563 (1941); *Poulos v. New Hampshire*, 345 U.S. 395 (1953); *Times Film Corp. v. City of Chicago*, 365 U.S. 43 (1961).<sup>13</sup> In holding that the government may punish individuals who engage in speech without having availed themselves of the procedure established by the government to determine whether such speech

<sup>13</sup> Because such licensing and permit schemes impose a prior restraint on speech, the Court has held that they must satisfy certain procedural requirements, which may vary with the circumstances. See, e.g., *FW/PBS, Inc. v. Dallas*, 493 U.S. 215 (1990); *Freedman v. Maryland*, 380 U.S. 51 (1965). In the agency fee context, *Hudson* establishes the requisite procedures.

should be permitted, this Court has not reasoned that the speakers failed to exhaust an administrative remedy for a constitutional violation. Rather, the point of the cases is that, where a speaker has declined to participate in a reasonable procedure established by the government to determine whether the speech in question should be permitted or whether legitimate government interests would be best served by denying such permission, the government's refusal to permit the speech *does not violate the First Amendment*. See also *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985) (rejecting claim under Takings and Due Process Clauses on ground that petitioner had not first followed state administrative procedures for reaching final decision on the taking, because "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue").

Such principles are fully applicable here. See Martin H. Malin, *The Legal Status of Union Security Fee Arbitration After Chicago Teachers Union v. Hudson*, 29 B.C. L. Rev. 857, 881 (1988) (no First Amendment injury accrues unless and until the arbitrator frees the union to spend money over the nonmember's objection). The essence of a cognizable First Amendment claim in the agency fee context is "that a union has utilized an individual agency-shop agreement to force dissenting employees to subsidize ideological activities." *Lehnert*, 500 U.S. at 516. When a union has sent a notice informing a nonmember that it will not spend his funds for any activity the nonmember regards as not germane to collective bargaining unless and until an impartial arbitrator has sustained the union's right to do so, and the nonmember fails to participate in the arbitration simply because he would rather proceed directly to court, the union's action in spending the objector's funds cannot fairly be characterized as "forc[ing]

[the] dissenting employee[] to subsidize ideological activities." Rather, in that circumstance a union has not run afoul of the First Amendment, any more than the government would violate the First Amendment by refusing to allow a parade when the would-be marchers have declined to participate in a reasonable permit process.

For this reason, to require objecting nonmembers to pursue their objections in the first instance through an impartial decisionmaking process not only best effectuates the Court's decision in *Hudson* and the balance of interests that underlies that decision, but is perfectly consistent with this Court's First Amendment jurisprudence in other contexts.

#### CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the Court of Appeals, and hold that nonmembers who have not presented their objections to the impartial decisionmaker mandated by this Court's opinion in *Hudson* may not mount a judicial challenge to a union's agency fee.

Respectfully submitted,

ROBERT H. CHANIN

*(Counsel of Record)*

JEREMIAH A. COLLINS

JONATHAN D. HACKER

BREDHOFF & KAISER, P.L.L.C.

1000 Connecticut Avenue, N.W.

Suite 1300

Washington, D.C. 20036

(202) 833-9340

(9)

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IN THE  
**Supreme Court of The United States**

OCTOBER TERM, 1997

AIR LINE PILOTS ASSOCIATION,

*Petitioner,*

v.

ROBERT A. MILLER, *et al.*,

*Respondents.*

On Writ of Certiorari to the  
United States Court of Appeals  
for the District of Columbia Circuit

**BRIEF FOR THE MACKINAC CENTER FOR PUBLIC  
POLICY AS AMICUS CURIAE  
IN SUPPORT OF RESPONDENTS**

*Of Counsel:*

ROBERT P. HUNTER  
MACKINAC CENTER FOR  
PUBLIC POLICY  
140 West Main Street  
P.O. Box 568  
Midland, MI 48640  
(517) 631-0900

FRANK T. MAMAT\*  
J. WALKER HENRY  
GEORGE M. MESREY  
CLARK HILL P.L.C.  
500 Woodward Avenue  
Suite 3500  
Detroit, MI 48226-3435  
(313) 965-8300

*Counsel for the Amicus Curiae*

\*Counsel of Record

Bulmar Legal Publishing Services, Washington, D.C., (202) 682-9800

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## IN THE Supreme Court of The United States

OCTOBER TERM, 1997

AIR LINE PILOTS ASSOCIATION,  
*Petitioner,*  
v.

ROBERT A. MILLER, *et al.*,  
*Respondents.*

On Writ of Certiorari to the  
United States Court of Appeals  
for the District of Columbia Circuit

## BRIEF FOR THE MACKINAC CENTER FOR PUBLIC POLICY AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

The Mackinac Center for Public Policy ("Mackinac Center") files this brief *amicus curiae* with the written consent of the parties as provided for in the Rules of this Court.<sup>1</sup>

## INTEREST OF THE AMICUS CURIAE

The Mackinac Center is a non-partisan research and education organization devoted to improving the quality of life for all Michigan citizens by promoting sound solutions to

<sup>1</sup>—No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus curiae*, made a monetary contribution to the preparation or submission of this brief.

federal, state and local policy questions. The Mackinac Center's objective is to generate a more sophisticated level of political and economic understanding among Michigan citizens and decision makers. Committed to its independence, the Mackinac Center neither seeks nor accepts any government funding. Instead, it enjoys the support of foundations, individuals and businesses who share a concern for Michigan's future and recognize the important role of sound public policy. The Mackinac Center Board of Scholars consists of some of the country's foremost experts in economics, science, law, psychology, history and related disciplines.

Michigan citizens have been a catalyst in establishing constitutional protections in the area of compulsory union dues. In fact, a significant amount of the Court's jurisprudence on this subject has involved Michigan citizens and unions. Thus, the Mackinac Center is particularly interested in the issues raised in this case and believes that its perspective, information and expertise will assist the Court in deciding the questions presented. The Mackinac Center has conducted extensive research on the impact of compulsory union dues upon employees, employers and labor unions, which culminated in a recently published treatise considered to be one of the most authoritative and comprehensive publications of its kind.<sup>2</sup> In addition, the Mackinac Center has taken an active role in shaping Michigan and national labor policy on this issue. For example, Mackinac Center Director of Labor Policy, Robert P. Hunter, a former member of the National Labor Relations Board (1981-1985), testified before a subcommittee of the United States House of Representatives Committee on Education and the Workforce on January 22, 1998, regarding the impact of compulsory union dues.

The Mackinac Center believes that the Court's decision in this case will have a profound impact on all employees'

<sup>2</sup> Robert P. Hunter, *A Mackinac Center Report: Compulsory Union Dues in Michigan*, (1997).

ability to exercise their statutory and constitutional rights in the workplace, and asserts that the District of Columbia Circuit Court of Appeals decision below strikes the proper balance between the competing interests represented by the parties in this case and should be affirmed. Thus, the Mackinac Center submits this brief *amicus curiae* in support of Respondents and the decision of the court of appeals below.

### PRELIMINARY STATEMENT

The Court granted the Petition for a Writ of Certiorari to consider the following question:<sup>3</sup>

When nonunion employees wish to challenge the agency fee they are required to pay under an agency-shop agreement, must they exhaust the "impartial decision maker" procedure mandated by this Court's decision in *Chicago Teachers Union, Local #1 v. Hudson*, 475 U.S. 292 (1986), before bringing their claim to court?

The relevant facts in this case are straightforward and set out at length by the court of appeals below.<sup>4</sup> The Air Line Pilots Association ("ALPA" or "Petitioner") is the exclusive bargaining representative of all pilots ("Pilots" or "Respondents") employed by Delta Airlines ("Delta"). In 1991, ALPA and Delta entered into an agency shop collective bargaining agreement ("CBA") under the Railway Labor Act ("RLA")<sup>5</sup> which requires all Delta Pilots who choose not to be union members to pay a service charge to ALPA "as a contribution for the administration of the [collective bargaining agreement] and the representation of [all]

<sup>3</sup> *Air Line Pilots Association v. Miller*, \_\_\_ U.S. \_\_\_, 118 S.Ct. 554 (1997).

<sup>4</sup> *Miller v. Air Line Pilots Association*, 108 F.3d 1415 (D.C. Cir. 1997).

<sup>5</sup> 45 U.S.C. §§ 151-88.

employees." In conjunction with the agency shop agreement, ALPA unilaterally devised and implemented written "Policies and Procedures Applicable to Agency Fees" ("Union Policy"). Under the Union Policy, ALPA calculates, on a yearly basis, which of its expenditures it believes are germane to collective bargaining and which are not and reports those findings in a "Statement of Germane and Nongermane Expenses" ("SGNE"). The SGNE sets forth germane and nongermane project codes and indicates how much money was spent on each code. The SGNE does not, however, provide objecting employees with any precise information concerning ALPA's expenditures.

If a nonmember Pilot objects to ALPA's use of agency fees for purposes not germane to collective bargaining, ALPA will reduce the objector's fees by a predetermined amount (as calculated by ALPA). If the objecting employee protests the predetermined calculation, ALPA will unilaterally initiate arbitration proceedings under its Union Policy. The arbitration is conducted pursuant to the American Arbitration Association ("AAA") Rules for Impartial Determination of Union Fees. At the request of ALPA, AAA will select an arbitrator from "a special panel of arbitrators experienced in employment relations." The Union Policy affords the objecting employee no opportunity to participate in the arbitrator selection process. More importantly, an objecting employee is forced to submit his or her dispute to the arbitrator *prior* to initiating an action in federal court. ALPA will pay for the cost of the arbitration but not for the objecting employee's attorneys fees. ALPA has never allowed the Pilots any role in formulating the Policy, and significantly, none of them ever agreed to be bound by its provisions.

In the instant case, a number of nonmember Pilots were dissatisfied with the procedures in the Union Policy as well as the propriety of 1992 SGNE calculations/designations and they complained to ALPA about it. ALPA reacted by unilaterally initiating arbitration proceedings. In response, some of the nonmember Pilots joined together and filed a

lawsuit against ALPA in federal district court seeking judicial resolution of their fee dispute. Additionally, they requested the arbitrator not to proceed but he refused. Thereafter, the Pilots filed a motion for a preliminary injunction with the district court seeking to enjoin the arbitration proceeding, but it too was denied.

Prior to the arbitration hearing, the Pilots sought discovery in order to properly evaluate ALPA's summary data concerning germane/nongermane expenditures but the arbitrator refused to exercise the authority he possessed under the AAA rules to permit this critical process. Thus, the only evidence before the arbitrator was summary data created and generated by ALPA which reflected only general categories of union spending and not the specific expenditures. Without discovery, the Pilots had no way of determining the accuracy, honesty or even the calculation used in reporting the expenditures. Not surprisingly, the arbitrator subsequently sustained most of the challenged union fee determinations as being germane to collective bargaining.

The district court thereafter granted ALPA's motion for summary dismissal of the Pilots' claim that ALPA breached its duty of fair representation by failing to properly calculate its germane and nongermane expenses.<sup>6</sup> The district court did not review the arbitrator's findings of fact *de novo* but instead, evaluated them based merely on a "clearly erroneous" standard. The district court also rejected the Pilots' argument that ALPA could not unilaterally force them to arbitrate their claims pursuant to the internal union procedure before bringing an action in federal court.

The court of appeals reversed the district court's decision holding, *inter alia*, that the pilots were *not* required to submit their fee dispute to the ALPA arbitration procedure before bringing an action in federal court. In reaching this decision, the court of appeals stated:

<sup>6</sup> *Miller v. Air Line Pilots Association*, No. CIV.A. 91-3161(NHJ), 1995 WL 864556 (D.D.C. Aug. 30, 1995).

" . . . we simply see no legal basis for forcing into arbitration a party who never agreed to put his dispute over federal law to such a process. Nor is there anything in the Hudson majority opinion that even suggests that the Court thought it was putting protesting agency shop employees in that position. We therefore align ourselves with the Sixth and Third Circuits in holding that an employee who wishes to bring an action in federal court is not obliged to proceed first to arbitration, at the union's option." *Miller*, 108 F.3d at 1421.

### SUMMARY OF ARGUMENT

The Mackinac Center is a staunch advocate of employee rights. Therefore, it is particularly concerned about the destruction of employees' rights, whether it be by unions, employers or the government. The first argument centers on the Mackinac Center's belief that the central purpose behind *Hudson* was to protect employees' rights. The exhaustion of internal union remedies requirement advocated by Petitioner and its *amici curiae* is contrary to this Court's stated objective in *Hudson* to broaden the constitutional protections for employees subject to agency shop agreements. Therefore, the Mackinac Center contends that any exhaustion requirement would be a step backward and seriously undermine the positive protection and impact that *Hudson* has had upon employees' constitutional and statutory rights.

The second argument advanced by the Mackinac Center originates from the same pro-employee ideological perspective. Simply stated, due to the unique nature of agency fee disputes, an exhaustion requirement would likely discourage individual employees from pursuing their constitutional and statutory rights against the greater resources of the Unions, and in many cases, only serve to "exhaust" the employee and effectively prevent judicial review. These risks are magnified ten-fold in the instant case because the internal union procedure here, which was never

agreed to by Respondents, is inherently one-sided and provides no safeguards to assure a fair and cost effective forum for objecting employees to resolve agency fee disputes.

The Mackinac Center further contends, in accord with the decision of the court of appeals below, that there is no legal basis whatsoever for forcing a party to participate in a one-sided arbitration procedure when it never agreed to do so in the first place. This simple principle is well grounded in the jurisprudence of the Court and should be applied in the instant case to prevent a mandatory exhaustion requirement.

Finally, the Mackinac Center urges the Court to use this case as an opportunity to clear up the law pertaining to the constitutional impact of union security agreements upon private sector employees covered by the NLRA.<sup>7</sup> As described in detail below, the Mackinac Center believes that there is no difference in the government action present through the imposition of agency fee agreements whether it is imposed upon employees by the RLA or the NLRA. Thus, the Court should conclude that all agency fee agreements authorized and perpetuated by federal labor law constitute state action and should be subject to constitutional scrutiny.

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<sup>7</sup> 29 U.S.C. §§ 151-69.

## ARGUMENT

### I.

#### THE EXHAUSTION OF REMEDIES REQUIREMENT ADVOCATED BY THE PETITIONER IS HARMFUL TO EMPLOYEE RIGHTS AND INIMICAL TO THE LEGAL AND POLICY CONSIDERATIONS WHICH LED THE COURT TO ADOPT THE CONSTITUTIONAL SAFEGUARDS FOR COLLECTION OF AGENCY FEES IN *HUDSON*

The rights contained in the First Amendment<sup>8</sup> are among the most fundamental tenets of a free society. As this Court has acknowledged,

" . . . at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and conscience rather than coerced by the State." *Hudson*, at 302 n.9.

Closely intertwined with the First Amendment is the longstanding federal labor policy of *voluntary* unionism. See, e.g., *Patternmakers' League of North America AFL-CIO v. NLRB*, 473 U.S. 95 (1985). In fact, the great leader of the American labor movement, Samuel Gompers once wrote that:

"[t]here may be here and there a worker who for certain reasons unexplainable to us does not join a union of labor. This is his right, no matter how

<sup>8</sup> The First Amendment to the Constitution of the United States provides as follows:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

morally wrong he may be. It is his legal right and no one can dare question his exercise of that legal right." Florence Calvert Thorne, *Samuel Gompers-American Statesman* 24 (1957).

The late George Meany, the legendary and fiery president of the AFL-CIO (an *amicus curiae* in this case), later said of Gompers on this issue, "[h]e founded the American Federation of Labor on the bedrock of voluntarism." George Meany, *Foreword to Samuel Gompers, Seventy Years of Life and Labor* (1957).

This notion of freedom of association is the fundamental underpinning of the concept of voluntary unionism and led Congress, through passage of the Taft-Hartley Act in 1947,<sup>9</sup> to reject the Wagner Act's regime of compulsory unionism. *Communication Workers v. Beck*, 487 U.S. 735, 755 (1988). This critical policy decision was the product of extensive hearings wherein Congress determined that the closed shop and the abuses associated with it "created too great a barrier to free employment to be longer tolerated." *Beck*, 487 U.S. at 748 (citing from S.Rep. No. 105, 80th Cong., 1st Sess., 6 (1947) (S.Rep.), *Legislative History of the Labor Management Relations Act, 1947* (Committee Print compiled for the Senate Committee on Labor and Public Welfare, p. 412 (1974)(Leg.Hist.)). In 1951, Congress amended the Railway Labor Act to extend "to railroad labor the same rights and privileges of the union shop that are contained in the Taft-Hartley Act." *Beck*, at 487 U.S. at 746 (citing from 96 Cong.Rec. (1951) - remarks of Rep. Brown).

Congress and the Court have acknowledged that agency shop agreements and their inherent requirement that objecting employees still financially support their collective bargaining representative, significantly shrink employees' First Amendment and statutory rights. See, e.g., *Lenhert v. Ferris Faculty Association*, 500 U.S. 507, 516 (1991) (constitutional

<sup>9</sup> 29 U.S.C. § 141 *et. seq.*

rights); *Beck*, 487 U.S. at 755 (statutory rights). In this regard, the *Lenhert* Court observed that:

“[u]nions have traditionally aligned themselves with a wide range of social, political, and ideological viewpoints, any number of which might bring vigorous disapproval from individuals. To force employees to contribute, albeit indirectly, to the promotion of such positions implicates core First Amendment concerns.” *Lenhert*, 500 U.S. at 516.

However, Congress and the courts have allowed limited interference with employees’ constitutional and statutory rights through the imposition of agency shop agreements in order to promote the government’s policy interest in securing labor peace through the elimination of the “free rider” problem that would otherwise accompany union recognition. See, e.g., *Lenhert*, 500 U.S. at 516, 520-21; *Hudson*, 475 U.S. at 301-02.

Acknowledging the harmful impact that agency shop agreements have had upon employee rights, the Court has determined that both the RLA and the NLRA authorize the exaction of *only* those fees and dues necessary to “performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.” *Beck*, 487 U.S. at 762-63. Thus, a union is prohibited from collecting from objecting employees any sums for the support of ideological causes *not* germane to its duties as collective bargaining agent. *Hudson*, 475 U.S. at 294. While he may have been slightly before his time, even Thomas Jefferson commented nearly two centuries ago that “[t]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.” I. Brant, *James Madison: The Nationalist* 354 (1948).

This concept of the sanctity of individual employees’ constitutional and statutory rights is at the very heart of the Court’s decision in *Hudson*. As the *Hudson* Court acknowledged,

“[P]rocedural safeguards often have special bite in the First Amendment context. . . . The purpose of these safeguards is to insure that the government treads with sensitivity in areas freighted with First Amendment concerns.” *Hudson*, 475 U.S. at 303 n.12.

Because of the destruction of employees’ constitutional rights inherent in agency shop agreements, the *Hudson* decision expanded the protection of employee rights by imposing the following constitutional requirements upon unions that insist upon collecting agency fees: (1) the union must provide an adequate explanation for the basis for the fee assessed; (2) the union must provide employees with a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision maker; and (3) the union must provide an escrow for the amounts reasonably in dispute while the fee dispute is pending. *Hudson*, 475 U.S. at 310 (emphasis added).

ALPA and its *amici curiae* misconstrue the purpose of the constitutional requirements set forth in *Hudson* for the collection of agency fees. Specifically, by arguing that the Court should interpret the “impartial decision maker” requirement to impose an obligation upon the individual employee to exhaust internal union-devised complaint procedures *before* seeking redress for constitutional violations in the federal courts, they are asking this Court to retreat from the very reason that it issued the *Hudson* decision: namely *fundamental fairness and protection of employee rights*. It is most telling that Petitioner concedes on page 22 of its Brief that “...it is, after all, to their [referring to the Respondent employees] advantage to have a choice of forums.” The Mackinac Center posits that the constitutional protections created in *Hudson* should be interpreted to protect employees. Most notably, it is employees’ constitutional and statutory rights that are restricted through the imposition of agency shop agreements and it is *their* money that is being used for political and ideological positions that they might find

abhorrent. Thus, imposing the extreme requirement of exhaustion of remedies upon employees with limited resources is contrary to the precise reasons this Court issued the *Hudson* decision and would be an affront to the fundamental principle of voluntary unionism. The court of appeals below refused to allow this to happen commenting "[n]or is there anything in the *Hudson* majority opinion that even suggests that the Court thought it was putting protesting agency shop employees in that position." *Miller*, 108 F.3d at 1421.

ALPA and its *amici curiae* nonetheless argue that, since the constitutional requirements set forth in *Hudson* are judicially created, this Court should exercise its discretion and impose the inherently punitive and oppressive requirement that objecting employees must *first* submit their disputes to internal union-dominated arbitration procedures in order to retain their right to *later* sue in federal court. The Mackinac Center agrees that, in the absence of an explicit Congressional mandate requiring exhaustion, sound judicial discretion governs. See, e.g., *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992). However, the Mackinac Center strenuously disagrees with the argument that exhaustion should be imposed in constitutional and statutory agency fee disputes, especially when the "internal remedy" is one-sided and unilaterally promulgated and totally administered by the alleged wrongdoer. Instead, the Mackinac Center urges the Court to exercise its discretion not to impose an exhaustion requirement. To conclude otherwise would seriously jeopardize the protections already extended to employees in *Hudson* by the Court.<sup>10</sup> Surely, setting up another roadblock

<sup>10</sup> Many of the arguments raised by the Petitioner and its *amicus curiae* in support of exhaustion directly or indirectly involve speculative "institutional inconveniences" that labor unions might have to endure if employees have the choice between utilizing internal union procedures or filing directly in federal court. Simply stated, these inconveniences pale in comparison to the chilling effect upon employees' statutory and constitutional rights that would occur if exhaustion was required. Moreover, it is disingenuous to argue that the minor inconveniences that

to the protection of the federal courts for the constitutional and statutory rights involved here hardly serves to enhance employee rights. In fact, as discussed below, it is likely that shackling employees with Petitioner's arbitration procedure without mutual agreement as to who will decide the dispute and without a meaningful opportunity for discovery will discourage or prevent them from exercising their rights at all.

## II.

### IMPOSING AN EXHAUSTION OF INTERNAL REMEDIES REQUIREMENT IN AGENCY FEE DISPUTES SLANTS THE PROCESS IN FAVOR OF UNIONS AND HINDERS EMPLOYEES FROM ASSERTING THEIR CONSTITUTIONAL AND STATUTORY RIGHTS

The Mackinac Center contends that requiring an exhaustion of internal remedies in this case would discourage and/or prevent employees from exercising their constitutional and statutory rights. It takes fortitude and strength of conviction for individual employees to stand up to a union, co-workers, and sometimes even family members, especially in light of the fact that most employees have a significant amount of time, emotional energy and personal dignity invested in their jobs and their relationships in the workplace. Moreover, their employers may be outwardly hostile to their efforts or, at best, hesitant to provide support for fear of angering the union or meddling in "internal union affairs." Thus, employees who object to a union's use of their dues for personally offensive ideological or political views often find themselves in a precarious position, opposed by the union, the employer and fellow employees. Significantly, such agency fee objectors almost find themselves in an even darker "no-man's-land" than the striker who crosses the picket line to

might occur would significantly hamper a union's ability to properly represent its members.

return to work while the strike continues: a person with legal rights and beliefs, mistrusted and abused by his Union, his employer and his peers.

In light of these workplace realities, the practical effect of imposing an exhaustion requirement when the internal union arbitration procedure is so one-sided in its design and application would be that many employees would be intimidated and elect not to exercise their right to object at all. An employee who has made the courageous decision to object may reasonably view the prospect of suffering through an intrusive arbitration procedure unilaterally devised and imposed by the union as not worth the emotional and mental anguish that would likely result. Thus, there is a significant chance that the only practical effect of imposing an exhaustion of internal remedies requirement in this case would be to "exhaust" objecting employees and effectively prevent them from seeking judicial redress for constitutional and statutory violations. *NLRB v. Marine and Shipbuilding Workers*, 391 U.S. 418, 425 (1968).

Moreover, while under *Hudson* a union must provide (and pay for) an impartial decision maker,<sup>11</sup> the ALPA arbitration procedure effectively requires employees, as a practical matter, to hire and pay for their own counsel in order to have any reasonable chance of properly presenting their case and preserving their rights for a subsequent challenge in federal court. This would be expensive and in many cases,

<sup>11</sup> This also raises the issue of whether the Petitioner's process for unilaterally selecting an arbitrator is appropriate. The court of appeals below stated "[i]t may well be that, for instance, that the arbitrators chosen by the AAA from a group 'experienced in labor matters' would not be perceived as typically sympathetic to such plaintiffs (or their counsel)." *Miller*, 108 F.3d at 1421. Moreover, ALPA's unilateral determination as to the method for selecting the arbitrator defies an essential element of arbitration "that the selection of the particular arbitrator or the method of selection of an arbitrator be established by mutual agreement between the parties." *Bethlehem Mines Corp. v. Mine Workers*, 344 F.Supp. 1161, 1165 (W.D. Pa. 1972), *aff'd*, 494 F.2d 726 (3d Cir. 1974).

deplete an employee's financial resources to the point where a challenge in federal court would not be possible.

This problem is exacerbated by the limited availability of discovery in the arbitration policy adopted by Petitioner. In order to have a meaningful arbitration process to determine agency fees, the employee must have access to union records in order to assess the propriety of the union's allocations and not just summary data. The Court should note that, in the instant case, the arbitrator denied Respondents discovery in the arbitration proceeding. Compounding this problem further is the danger that the factual basis for the arbitration award may not be reviewed *de novo* by a federal court. This could lead to an employee being essentially "frozen out." Because of these dangers, an employee would be foolish to participate in Petitioner's arbitration procedure without the assistance of counsel. Even with the assistance of counsel, however, the arbitration procedure as it currently stands is impermissibly slanted in favor of Petitioner.

Thus, unless employees are provided with the option of using union arbitration procedures and/or proceeding directly into federal court, there is a significant chance that they will be discouraged and/or ultimately prevented from exercising their constitutional and statutory rights. Practically speaking, most objecting employees probably only have enough emotional and financial capital to make their fight *one* time in *one* forum and it should be the forum of *their* choice, not that of the Union. As the court of appeals below observed in response to Petitioner's "institutional convenience" arguments, it is not inconceivable, given the disincentives both sides face, that objecting employees could be persuaded to use the arbitration procedures in lieu of a court challenge if they were given more say in the selection of the arbitrator and the development of the rules for discovery options and regulating the proceeding. *Miller*, 108 F.3d at 1421. However, under the arbitration procedure devised by Petitioner in the instant case, objecting employees have no

input whatsoever and are disadvantaged by the one-sided rules and regulations ALPA has unilaterally imposed.

### III.

#### THE DISTRICT OF COLUMBIA CIRCUIT'S CONCLUSION THAT A UNION CANNOT UNILATERALLY FORCE AN EMPLOYEE TO ARBITRATE HIS OR HER FEE DISPUTE CLAIM IS THE PROPER LEGAL INTERPRETATION OF THE "IMPARTIAL DECISION MAKER" PROCEDURE FORMULATED IN HUDSON

It is a fundamental principle of federal labor law that a party can never be compelled to submit its dispute to arbitration unless it has expressly agreed to do so. E.g. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 648-49 (1986); *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368, 374 (1974). This axiom recognizes that arbitrators derive their authority to resolve disputes only from the parties' agreement allowing them to do so. *Gateway Coal*, 414 U.S. at 374. In addition, as Respondents are not members of ALPA, they are "not bound by contract with the union to exhaust any formal internal union appeals before resorting to a judicial forum." *Soho Segarra v. Sea-Land Serv., Inc.*, 581 F.2d 291, 295 (1st Cir. 1978). Moreover, nonmember status was the crucial fact in *Patternmakers* which led the Court to rule that a union cannot apply its internal disciplinary rules to individuals who have resigned from the union. *Patternmakers*, 473 U.S. at 106.

In the instant case, the arbitration procedure devised by Petitioner was unilaterally implemented and imposed without any input whatsoever from the nonunion Respondents. At no point did Respondents consent to arbitration of disputes over the use and calculation of agency fees. Therefore, the court of appeals below rejected Petitioner's arguments and correctly held that there is no legal basis for forcing Respondents to

participate in Petitioner's arbitration procedure since they never agreed to submit their dispute over federal law to such a process. *Miller*, 108 F.3d at 1421.

This conclusion is in accord with those of other circuits as well. The Sixth and Third Circuits have concluded in public sector cases that a labor union cannot force an objecting employee to exhaust internal union remedies before filing an action in federal court. *Bromley v. Michigan Education Association-NEA*, 82 F.3d 686 (6th Cir. 1996); *Hohe v. Casey*, 956 F.2d 399 (3d Cir. 1992). Likewise, the District of Columbia Circuit and the Sixth Circuit have reached the same conclusion in duty of fair representation cases under the NLRA. *Abrams v. Communications Workers*, 59 F.3d 1373 (D.C. Cir. 1995); *United Food and Commercial Workers, Local 951 v. Mulder*, 31 F.3d 365, 367-68 (6th Cir. 1994).<sup>12</sup> The Mackinac Center urges this Court to adopt the legal reasoning in these decisions and give employees the meaningful ability to fully exercise their constitutional and

<sup>12</sup> The NLRB recently announced that it has selected a pending case for accelerated review which addresses the same issues pending before this Court in the hope that the Court will have the benefit of its input in rendering its decision. 15 *Daily Labor Report* (BNA) A-2, A-3, (Jan. 23, 1998) (*Kroger, Inc.*, Case No. 9-CA-31116 and *United Food & Commercial Workers, Local 1099*, Case No. 9-CB-8672). While an administrative law judge's decision is not binding on the NLRB or this Court, it is noteworthy that, in concluding that the exhaustion requirement violates the duty of fair representation, the administrative law judge wrote:

"It follows, as a matter of basic fairness, that the union should not be able to frustrate and interfere with those rights by erecting procedural obstacles. In my opinion, requiring core members to observe an internal union appeals process as a precondition to impartial consideration of reduced fee protests is unlawful, and, under those circumstances, continuing to receive dues under the check-off provisions of the contract violates Section 8(b)(1)(A) and (2) of the Act." 15 *BNA Daily Labor Report* at A-3.

The Mackinac Center believes that this passage is directly on point and urges that this Court adopt the same rationale in the instant case.

statutory rights. While arbitration can be beneficial in certain situations, the lack of mutual consent and the inability to discover essential information to properly prepare for the hearing, in the instant case, creates a tribunal which is contrary to the concept of fundamental fairness and is legally defective.

#### IV.

**THE COURT SHOULD DETERMINE THAT THE STATUTORY IMPOSITION OF AN AGENCY SHOP AGREEMENT CONSTITUTES GOVERNMENT ACTION AND THUS, EMPLOYEES SUBJECT TO SUCH AGREEMENTS ARE PROTECTED BY THE CONSTITUTION REGARDLESS OF WHETHER THEY WORK IN THE PUBLIC OR PRIVATE SECTOR AND REGARDLESS OF WHICH FEDERAL LABOR LAW REGULATES THE INDUSTRY IN WHICH THEY ARE EMPLOYED**

The Mackinac Center has an active interest in private and public sector labor issues and advocates uniformity in the law whenever appropriate. This case raises a fundamental problem with the current state of the law in regard to agency shop agreements. Specifically, this is a private sector duty of fair representation case governed by the RLA. Yet, the issue upon which the Court granted the writ of certiorari involves the public sector and constitutional questions. Mackinac Center sees no practical or legal distinctions between agency shop agreements in the private and public sectors which would justify denying constitutional protections to private sector employees. The law, as it currently stands, is fractured and leads to contradictory results. Thus, your *amicus curiae* urges the Court to use this case as a vehicle to clear up the legal inconsistencies in the interpretation of agency shop agreements and properly conclude that state action is involved whenever federal law allows the imposition of such agreements.

In *Railway Employees Dept. v. Hanson*, 351 U.S. 225, 232 (1956), the Court acknowledged that

"[t]he enactment of the federal statute authorizing union shop agreements is the governmental action upon which the Constitution operates, though it takes a private agreement to invoke the federal sanction."

The *Hanson* Court went on to point out that, since the RLA expressly allows union shop agreements notwithstanding state law to the contrary, the RLA has the imprimatur of federal law upon it. *Hanson*, 351 U.S. at 232. In a footnote, the Court commented that "[t]he parallel provision in s 14(b) of the Taft Hartley Act ... makes the union shop agreement give way before a state law prohibiting it." *Hanson*, 351 U.S. at 232 n.5.<sup>13</sup> As the *Beck* Court pointed out, however, the question of whether the NLRA invokes state action has not been definitively ruled on. *Beck*, 487 U.S. at 761-62.

The reality is that governmental action is plainly behind all union security arrangements authorized by federal law, whether they draw their authority from the RLA or the NLRA and regardless of the private or public nature of the employer involved. Since collective bargaining is mandated by the RLA and the NLRA, any agreement, including a union security provision, entered into between an employer and a union is the product of state action. Charles W. Baird, "The Permissible Uses of Forced Union Dues: From *Hanson* to *Beck*," *Policy Analysis* 174, at 12-13 (July 24, 1992). Employees in states which have not enacted right to work legislation pursuant to Section 14(b) of the NLRA are in exactly the same situation as private sector employees covered by the RLA. This is clear since the Court held in *Beck* that the union security provisions

<sup>13</sup> Section 14(b) of the NLRA (29 U.S.C. §164(b)) states as follows:

Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

under the RLA and the NLRA and should be interpreted identically. *Beck*, 497 U.S. at 762-63.

In sum, a determination that there is sufficient state action whenever federal law sanctions an agency shop agreement would clarify the law in this area and provide employees, employers and unions with certainty in conducting their affairs. It should be noted that the National Education Association has alluded to this problem in footnote 2 of its Brief as an *amicus curiae* on behalf of the Petitioner. Moreover, inasmuch as the NLRB has slated a case for accelerated review so the Court will have the benefit of its views when deciding this case, the time is right to finally rule on this issue. See n.12, *supra*.

### CONCLUSION

Contrary to the position urged by Petitioner and its *amici curiae*, allowing employees to exercise their constitutional and statutory rights to the fullest extent possible is certainly not anti-union. Instead, it is pro-employee. This principle of employee rights was the underlying reason the Court adopted the constitutional safeguards in *Hudson* and it should be the Court's focus in the instant case. Thus, for the reasons set forth in this Brief, and upon the entire record, the judgment of the court of appeals below should be affirmed

Respectfully submitted,

CLARK HILL P.L.C.

By:

Frank T. Mamat

J. Walker Henry

George M. Mesrey

500 Woodward Avenue

Suite 3500

Detroit, Michigan 48226-3435

(313) 965-8300

Attorneys for *Amicus Curiae*

Mackinac Center for Public Policy

\*Counsel of Record

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